Supreme Court, U.S.
FILED
JAN 25 2011
OFFICE OF THE CLERK

No. 10-966

In the

Supreme Court of the United States

WILLIAM ROGER CLEMENS,
Petitioner,

v.

BRIAN McNAMEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985), the Court held that specific personal jurisdiction exists when "the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities . . . ." The lower courts have divided sharply on the meaning of "arise out of or relate to," applying at least five different tests to the connection between plaintiffs' claims and nonresident defendants' forum contacts. The first question is:

> Does the Due Process Clause permit a state to exercise specific personal jurisdiction over a nonresident defendant when the plaintiff's claim "relates to" the defendant's state contacts, but does not "arise out of" those contacts?

2. In *Calder v. Jones*, 465 U.S. 783, 791 (1984), the Court held that the Due Process Clause permitted California to exercise personal jurisdiction over nonresident defendants in a defamation case "because of their intentional conduct in Florida calculated to cause injury to respondent [Shirley Jones] in California." *Calder* noted that the defendants' actions were "expressly aimed" at California, and mentioned that the article concerned Jones's California activities and was drawn from California sources. *Id.* at 788-89. Courts now disagree about whether a defamatory statement must refer to the forum and be drawn from forum sources to satisfy *Calder*'s "express aiming" requirement. The second question is:

Does the Due Process Clause require that a defamatory statement refer to a state and be drawn from sources in the state to permit the state to exercise specific personal jurisdiction over a nonresident defamation defendant?

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PETITION FOR WRIT OF CERTIORARI

Petitioner William Roger Clemens respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion in *Clemens v. McNamee* is reported at 615 F.3d 374 (5th Cir. 2010). App. 1a-26a. The district court's opinion and order granting in part, and denying in part, Respondent Brian McNamee's motion to dismiss is reported at 608 F. Supp. 2d 811 (S.D. Tex. 2009). App. 42a-70a. The district court's opinion and order denying Clemens's motion to reconsider is reported at 638 F. Supp. 2d 742 (S.D. Tex. 2009). App. 29a-41a.

JURISDICTION

The court of appeals entered judgment on August 12, 2010, App. 27a-28a, and denied a timely petition for rehearing *en banc* on October 27, 2010. App. 71a-72a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section 1, Clause 2 of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents two important personal jurisdiction questions. Although the Court has previously expressed interest in both issues, it has settled neither. Without guidance, the lower courts have disagreed on the answers to each question. Intervention by this Court is necessary.

I. Factual Background

A. Clemens Has Substantial Ties To Texas.

Clemens has lived in Texas since 1977. App. 77a. He attended Spring Woods High School, San Jacinto Junior College, and the University of Texas, all in Texas. *Id.* In 1983, Clemens led the Texas Longhorns to the national collegiate baseball championship. *Id.*

After completing his collegiate career, Clemens played professional baseball for the Boston Red Sox and Toronto Blue Jays between 1984-1998. App. 77a-79a. Clemens was traded to the New York Yankees in 1999, and he played there from 1999-2003 and in 2007. App. 79a, 82a. From 2004-2006, Clemens played for his hometown Houston Astros. App. 82a. Throughout his career, Clemens returned to his home in Houston, Texas at the end of each baseball season. App. 81a. He permanently resides there with his wife and four children. App. 81a-82a.

Clemens is also engaged in business and charitable ventures in Texas. App. 76a. He is a trustee of the Roger Clemens Foundation, a Houston-based charity, and also has long-term personal services contracts with the Houston Astros and other Texas-based businesses. *Id.*

B. McNamee Has Conducted Significant Business In Texas.

Clemens met McNamee while playing with the Toronto Blue Jays in 1998. App. 78a. McNamee was an assistant strength and conditioning trainer with the Blue Jays. App. 78a-79a. In 1999, McNamee began traveling to Texas during baseball's off-season to train Clemens at his home in Houston. App. 74a McNamee also trained Andy Pettitte, another Yankees pitcher and Texas resident, during his trips to Texas. *Id.* McNamee trained Clemens and Pettitte pursuant to oral contracts that required him to perform training services in Texas. *Id.*

From 1999-2007, McNamee traveled to Texas at least 30-38 times to train Clemens and/or Pettitte. App. 74a-75a. Each of McNamee's trips to Texas lasted approximately five days. *Id.* Thus, McNamee spent approximately 150-190 days in Texas training Clemens and/or Pettitte. *See id.* McNamee also earned significant income as payment for training Clemens and Pettitte in Texas. App. 74a.

C. McNamee Repeatedly Falsely Accused Clemens Of Using Steroids And HGH.

In 1999 or 2000, during a training session in Texas, McNamee falsely told Pettitte that Clemens had used

human growth hormone ("HGH"). App. 86a. In 2003 or 2004, during another training session in Texas, McNamee falsely told Pettitte that Clemens had used steroids. *Id.* McNamee later repeated these false accusations to the "Mitchell Commission." App. 83a-84a. The Mitchell Commission consisted of former United States Senator George Mitchell and his law firm, DLA Piper US, LLP. App. 83a. Major League Baseball, a private business, hired them to conduct an investigation into the use of performance-enhancing substances by professional baseball players. *Id.* Thereafter, McNamee repeated his false accusation that Clemens had used steroids to John Heyman, a reporter for SI.com. App. 85a, 93a-100a.

When he intentionally made his false accusation to SI.com, McNamee knew: (1) Clemens was a Texas resident; (2) Clemens had worked in Texas as a Houston Astro from 2004-2006; (3) Clemens had significant baseball and non-baseball related business interests in Texas; (4) Clemens runs a charitable foundation in Texas that bears his name; (5) his false accusation would have a devastating impact on Clemens's reputation, mental status, and business interests in Texas; (6) SI.com would republish and widely circulate his false accusations in Texas; and (7) numerous Texas residents would read his false accusations against Clemens. App. 75a-76a, 84a-86a.

McNamee's false statement to SI.com was in fact republished in an article posted to the website SI.com on January 7, 2008. App. 86a, 93a-100a. The SI.com article was circulated to—and read by—numerous Texans via the Internet, causing severe damage to Clemens's reputation, mental status, and business interests in Texas. App. 75a, 85a-86a.

II. Proceedings Below

Clemens sued McNamee for defamation in a Harris County, Texas district court for his false statements to the Mitchell Commission, SI.com, and Pettitte. App. 46a, 87a-89a. McNamee removed the case to the United States District Court for the Southern District of Texas based on diversity of citizenship, and then he moved to dismiss the complaint for lack of personal jurisdiction and failure to state a claim. App. 46a.

The district court dismissed for lack of personal jurisdiction Clemens's defamation claims based on McNamee's false statements to the Mitchell Commission and SI.com. App. 49a-53a, 69a-70a. In the alternative, the district court held that McNamee was absolutely immune from liability for his statements to the Mitchell Commission. App. 59a-63a. The district court found that it had personal jurisdiction over McNamee in Texas for Clemens's defamation claim based on McNamee's false statements to Pettitte, App. 46a n.1, 70a, but Clemens subsequently dismissed that claim with prejudice.

Clemens appealed. In a 2-1 decision, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal for lack of specific personal jurisdiction. App. 1a-2a. The panel majority found that McNamee's numerous business contacts with Texas were irrelevant to the jurisdictional inquiry because Clemens's defamation claim did not "arise[]" from them. *See* App. 2a, 6a-7a. The panel majority then held that Texas lacked personal jurisdiction over McNamee because *Calder* requires that defamatory statements refer to the forum and be drawn from forum sources to exercise

specific personal jurisdiction over a nonresident defamation defendant, and McNamee's defamatory statements did not refer to Texas and were not drawn from Texas sources. App. 9a.

Judge Catharina Haynes dissented. App. 11a-26a. Judge Haynes found the minimum contacts inquiry satisfied in two independent ways. App. 12a. First, McNamee's numerous business trips to Texas to train Clemens "related to" Clemens's defamation claim. *Id.* Second, under the *Calder v. Jones*, 465 U.S. 783 (1984) "effects" test, McNamee intentionally directed false statements to Texas where he knew Clemens resided and would bear the brunt of the injury from the statements. *Id.*; App. 21a. "Either considering only the business contacts by McNamee in Texas or considering the 'effects test' of *Calder* under the facts alleged here, McNamee had sufficient minimum contacts with Texas. When both are combined, this conclusion becomes even more clear." App. 25a.

Clemens now seeks review of whether McNamee's business contacts with Texas and/or the effects of McNamee's statements to SI.com are sufficient to give Texas specific personal jurisdiction over McNamee for his statements to SI.com.

REASONS FOR GRANTING THE WRIT

I. The Connection Required Between A Plaintiff's Claim And A Nonresident Defendant's Forum Contacts Remains Unsettled And Continues To Divide The Lower Courts.

A. Specific Jurisdiction Requires A Plaintiff's Claim To Either "Arise Out Of Or Relate To" A Nonresident Defendant's Forum Contacts.

In *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945), the Court held that a state's exercise of personal jurisdiction satisfies due process when a plaintiff's claims "arise out of or are connected with" a nonresident defendant's forum activities. In subsequent cases, the Court modified specific jurisdiction to require that the plaintiff's claim "arise out of or relate to" the defendant's forum activities. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Helicopteros Nacionales De Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984). Although the "arise out of or relate to" test is frequently used by the lower courts, the meaning of that nexus phrase remains unclear. *See O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 318 (3d Cir. 2007) ("The plaintiffs' claims must also 'arise out of or relate to' at least one of those contacts. . . . Unfortunately, the Supreme Court has not yet explained the scope of this requirement.").

B. The Court Previously Flagged The Nexus Question In *Helicopteros*, But Did Not Decide It.

In *Helicopteros*, the Court expressly left open for resolution the meaning of "arise out of or relate to":

> We do not address the validity or consequences of such a distinction [between controversies that 'relate to' a defendant's contacts with a forum and those that 'arise out of' such contacts] because the issue has not been presented in this case. Respondents have made no argument that their cause of action either arose out of or is related to Helicol's contacts with the State of Texas. Absent any briefing on the issue, we decline to reach the questions (1) whether the terms 'arising out of' and 'related to' describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists.

Helicopteros, 466 U.S. at 415 n.10. Although the Court did not resolve either of the two issues it identified, Justice Brennan opined in dissent on the first question that there was a "substantial difference" between the "arise out of" and the "relate to" standards. *Id.* at 425 (Brennan, J., dissenting).

C. The Court Previously Granted A Petition For A Writ Of Certiorari To Answer The Nexus Question, But Did Not Decide It.

In *Carnival Cruise Lines, Inc. v. Shute*, 498 U.S. 807 (1990), the Court granted a petition for a writ of certiorari to decide what connection the Due Process Clause requires between a plaintiff's claim and a nonresident defendant's forum contacts before the forum may exercise specific personal jurisdiction. *See O'Connor*, 496 F.3d at 318 n.4 ("The Court granted certiorari on the [nexus] question in *Carnival Cruise Lines* . . . ."). In that case, the petitioner's first argument was: "The Court should resolve a conflict among the circuits and states as to when a cause of action arises out of or relates to activities in the forum state for the purpose of asserting 'specific' in personam jurisdiction." Brief for the Petitioner at *8, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (No. 89-1647). Ultimately though, the Court did not answer the question in *Carnival Cruise Lines* because the Court decided the case on the basis of a forum-selection clause signed by the parties. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991); *see O'Connor*, 496 F.3d at 318 ("The Court granted certiorari on the [nexus] question in *Carnival Cruise Lines* . . . but ultimately decided the case on other grounds.").

D. The Lower Courts Remain Divided Regarding The Connection Required Between A Plaintiff's Claim And A Nonresident Defendant's Forum Contacts.

For more than twenty years, the lower courts have split on the connection required between a plaintiff's

claim and a nonresident defendant's forum contacts. Indeed, as noted above, the primary argument for granting the petition for a writ of certiorari in *Carnival Cruise Lines* in 1990 was the division among the circuit and state courts. Since then, the lower-court split in authority has not abated. Not only have more state and federal courts taken sides on the issue, but the number of tests employed and the number of states with competing federal and state-court decisions affecting the same state have also increased.

The division among the lower courts on this question has been thoroughly documented:

- *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008) – identifying and describing three different nexus tests used by lower courts;

- *O'Connor*, 496 F.3d at 318-21 – noting that while "[s]tate and lower federal courts have stepped in to fill the void [of Supreme Court guidance] . . . their decisions lack any consensus," and identifying six different nexus tests grouped into three approaches;

- *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) – recognizing that "there appears to be a split in the Circuits on the standard to be applied in determining if a tort claim 'relates' to the defendant's activities within the state";

- *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 579-85 (Tex. 2007) – identifying and describing at least four different nexus tests;

- *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 335 (D.C. 2000) – "Other jurisdictions have wrestled with the nexus requirement of specific jurisdiction in a variety of factual settings and have reached diverse conclusions as to the appropriate test for determining the proper nexus between the nonresident defendant's business activity and the claim asserted by the plaintiff."

Five of the different nexus standards employed by lower courts (including different tests applied by the same court) are described below.

1. Proximate Cause Or Formal "Arise Out Of" Test

The proximate cause test requires the claimant to show that jurisdiction "is premised on a contact that is a legal cause of the injury underlying the controversy – *i.e.*, that forms an important, or at least material, element of proof in the plaintiff's case." *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996) (quotation omitted). Justice Brennan, dissenting in *Helicopteros*, described this standard as a requirement that the cause of action "formally 'arise out of'" the defendant's forum contacts. *See Helicopteros*, 466 U.S. at 425, 427 (Brennan, J., dissenting).

The First and Eighth Circuits, as well as the Iowa Supreme Court, have applied a proximate cause test to evaluate whether the plaintiff's cause of action and the nonresident defendant's forum contacts are sufficiently connected such that it is proper to exercise specific personal jurisdiction over the defendant. *See, e.g.*, *Pizarro v. Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256,

1259 (1st Cir. 1990) ("Whether certain events 'arise out of' a nonresident defendant's actions within [the forum] is comparable or analogous to whether certain actions can be said to be the legal, or the proximate cause of injuries suffered by a plaintiff."); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067, 1069 (8th Cir. 1983) (applying a standard similar to proximate cause while holding that the connection between the defendant's sending a brochure into Arkansas and the plaintiff's injury was "too tenuous" to satisfy the "arise out of" standard in the Arkansas long-arm statute); *State of Iowa ex rel. Miller v. Baxter Chrysler Plymouth, Inc.*, 456 N.W.2d 371, 377 (Iowa 1990) (upholding specific jurisdiction for "consequences that arise proximately from" forum activities -- in that instance from unlawful advertising that reached the forum State) (quotation omitted).

2. Substantive Relevance Test

The "substantive relevance" standard "examines whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim."[1] *O'Connor*, 496 F.3d at 319. The Third and Seventh Circuits, as well as the Oregon Supreme Court, have applied a substantive relevance standard

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[1] Some courts and commentators have equated the proximate cause and substantive relevance standards. *See, e.g., O'Connor*, 496 F.3d at 318-19; *Moki Mac River Expeditions*, 221 S.W 3d at 581-82; Linda S. Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343, 349 (2005). This petition treats the tests separately because a standard that requires a forum contact to be the legal cause of the plaintiff's claim is necessarily more restrictive than a standard that requires a forum contact to be merely relevant to the plaintiff's claim.

to the nexus requirement. *See, e.g.*, *id.* at 320 (stating "in contract cases we have effectively required substantive relevance."); *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1278 (7th Cir. 1997) (noting "to be relevant for personal jurisdiction, . . . past contacts involving the forum state should either bear on the substantive legal dispute between the parties or inform the court regarding the economic substance of the contract."); *Gen. Elec*; *State ex rel. La Manuf. Francaise Des Pneumatiques Michelin v. Wells*, 657 P.2d 207, 211 (Or. 1982) (requiring the defendant's contacts to have "relevance to the substance of th[e] claim for relief").

3. Meaningful Link Test

The First and Third Circuits have applied a "meaningful link" test to tort claims. *See, e.g., Nowak*, 94 F.3d at 716 (concluding that "[w]hile the nexus between [the nonresident defendant's] solicitation of . . . business [in the forum] and the death [of the plaintiff's wife] does not constitute a proximate cause relationship, it does represent a meaningful link between [the defendant's] contact [with the forum] and the harm suffered."); *O'Connor* at 318, 324 (refusing to adopt a bright-line test, but reasoning "[i]t is enough [of a connection between a nonresident's forum contacts and the plaintiff's cause of action] that a meaningful link exists between a legal obligation that arose in the forum and the substance of the plaintiffs' claims.").

4. But-For Causation Test

The but-for causation standard "is satisfied when the plaintiff's claim would not have arisen in the

absence of the defendant's contacts." *O'Connor*, 496 F.3d at 320. The Fifth, Sixth, Seventh, and Ninth Circuits, as well as the Supreme Judicial Court of Massachusetts, have effectively applied a but-for causation test. *See, e.g.*, *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995) (holding that "[w]e rely on a 'but for' test to determine whether a particular claim arises out of forum-related activities . . . ."); *Lanier v. Am. Bd. of Endodontics*, 843 F.2d 901, 909 (6th Cir. 1988) (applying a test synonymous with but-for causation in holding that due process concerns are satisfied when the "cause of action . . . was 'made possible' by [defendant's forum contacts]"); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1216 (7th Cir. 1984) (applying a standard similar to but-for causation in holding that jurisdiction is proper when plaintiff's claim "lies in the wake of" the defendant's forum contacts); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. 1981) (finding that "[i]n a case like this, the contractual contact is a 'but for' causative factor for the tort since it brought the parties within tortious 'striking distance' of each other."); *Tatro v. Manor Care, Inc.*, 625 N.E.2d 549, 552-55 (Mass. 1994) (interpreting the Massachusetts long-arm statute to adopt a but-for test and holding that the statute is constitutional).

The Ninth Circuit applied the but-for causation test in *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385-86 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991). This is the case in which this Court previously granted a petition for a writ of certiorari. In *Carnival Cruise Lines*, two Washingtonians booked a Carnival cruise through a travel agent, and during the cruise one of them "slipped on a deck mat." *Carnival Cruise Lines*, 897 F.2d at 379. Carnival provided brochures to

travel agencies in Washington, and it also held seminars for Washington travel agents. *Id.* These contacts satisfied the but-for test because, "[i]n the absence of Carnival's activity, the Shutes would not have taken the cruise, and Mrs. Shute's injury would not have occurred." *Id.* at 386.

5. Substantial Connection Or "Related To" Test

The Second, Fourth, Sixth, Eleventh, and Federal Circuits, as well as the Supreme Courts of California, Connecticut, Minnesota, and Texas, and the District of Columbia Court of Appeals have applied a "substantial connection" or "related to" test to determine whether the plaintiff's cause of action and the nonresident defendant's forum contacts are sufficiently linked for the forum to exercise specific personal jurisdiction over the defendant. *See, e.g.*, *Chew*, 143 F.3d at 29 (holding that "[w]here the defendant's contacts with the jurisdiction that relate to the cause of action are more substantial . . . it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury."); *Akro Corp. v. Luker*, 45 F.3d 1541, 1547 (Fed. Cir. 1995) (noting that the connection test's disjunctive phrasing—"arise out of or relate to"—itself implies a "flexib[le]" and "relax[ed]" standard, and adopting the related to standard); *Third Nat'l Bank in Nashville v. WEDGE Group Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989) (noting that due process "does not require that the cause of action formally 'arise from' defendant's contacts with the forum; rather this criterion requires only that the cause of action . . . have a substantial connection with the defendant's in-state activities"); *City of Virginia*

Beach v. Roanoke River Basin Ass'n, 776 F.2d 484, 487 (4th Cir. 1985) (concluding that "[t]he activities that support the jurisdictional claim must coincide with those that form the basis of the plaintiff's substantive claim"); *Southwire Co. v. TransWorld Metals & Co.*, 735 F.2d 440, 442-43 (11th Cir. 1984) ("Although the cause of action does not arise out of the post-contract negotiations the cause is connected with those negotiations. . . . The suit is sufficiently connected to defendants' activities within the forum to justify the exercise of jurisdiction."); *Moki Mac River Expeditions*, 221 S.W.3d at 580 (finding that "[f]or a nonresident defendant's forum contacts to support an exercise of specific jurisdiction, there must be a substantial connection between those contacts and the operative facts of the litigation."); *Vons Co., Inc. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1096 (Cal. 1996) (reasoning that "[a] claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Rather, as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate"); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 533 N.W.2d 25, 31 (Minn. 1995) (when a claim "has a 'substantial connection' with the forum state, specific jurisdiction exists"); *Thomason v. Chemical Bank*, 661 A.2d 595, 603 (Conn. 1995) (holding that "arising out of" test does "'not [] require a causal connection between the defendant's solicitation here and the plaintiffs' lawsuit" but only that "it was reasonably foreseeable that, as a result of that solicitation, the defendant could be sued in Connecticut . . . on a cause of action similar to that now being brought by the plaintiffs,'" and construing "arising out of" language of long-arm statute, not due process clause); *Shoppers*

Food Warehouse v. Moreno, 746 A.2d 320, 335 (D.C. 2000) (interpreting the "arise from" language of the District of Columbia long-arm statute synonymously with "relate to" and "substantial connection with").

6. No Choice

The Tenth Circuit has rejected the "substantial connection" test, but expressly refused to choose between the but-for and proximate cause standards. *See Dudnikov*, 514 F.3d at 1078-79.

E. Legal Scholars Are Likewise Divided Regarding The Connection Required Between A Plaintiff's Claim And A Nonresident Defendant's Forum Contacts.

The division among the lower courts, together with this Court's near encounter with the issue in *Helicopteros* and *Carnival Cruise Lines*, also has prompted a vigorous debate among legal scholars, but once again no consensus has emerged. *See, e.g.*, Simard, *supra*, at 343; Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988); Mary Twitchell, *A Rejoinder to Professor Brilmayer*, 101 HARV. L. REV. 1465 (1988); William M. Richman, *A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction (Part II-A)*, 72 CAL. L. REV. 1328 (1984); Lea Brilmayer, *How Contacts Count: Due Process Limitations On State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77. *See also* Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545 (1994); Mark W. Maloney, Note, *Specific Personal*

Jurisdiction and the "Arise From or Relate To" Requirement . . . What Does It Mean?, 50 WASH. & LEE L. REV. 1265 (1993).

As these numerous citations suggest, the issue presented implicates a deep division in the courts and among legal scholars. Ample time has elapsed to allow enlightened perspectives on the issue to develop, and if it was appropriate to grant review of the issue in *Carnival Cruise Lines* in 1990, it is even more appropriate to do so today in view of the ever increasing number of federal circuits and state supreme courts that have issued conflicting opinions on the matter. This federal issue is ripe for review.

F. This Recurring Federal Question Is Exceedingly Important.

In addition to the stark division of lower-court authority, the essential nature of this federal question independently justifies granting the writ.

First, as the extensive case citations in this petition illustrate, the nexus issue arises frequently in litigation and is of substantial importance to the day-to-day workings of the federal and state courts.

Second, in addition to the customary requests for uniformity that a deep conflict in the lower courts prompts, the issue here has led to uncertainty even for residents in the same state. The Ninth Circuit and the California Supreme Court have long charted different paths in answering this specific jurisdiction question. *See, supra.* So too, more recently, have the First Circuit and the Supreme Judicial Court of Massachusetts, and the Fifth Circuit and the Texas

Supreme Court. *See, supra*. Neither the residents of these states nor any others should face such unpredictable jurisdictional consequences dependent solely on whether a case is in state or federal court.

Third, the large number of lower courts and legal scholars that have cried out for guidance from this Court over the proper resolution of the nexus question reinforces the consequential nature of this federal issue. *See, e.g., See O'Connor*, 496 F.3d at 318 ("Unfortunately, the Supreme Court has not yet explained the scope of this [nexus] requirement."); *Doe v. National Med. Serv.*, 974 F.2d 143, 146 (10th Cir. 1992) ("[t]he Supreme Court has not addressed whether there is a distinction between suits which 'arise out of' and those which 'relate to' the defendant's contacts"); *Moki Mac River Expeditions*, 221 S.W.3d at 584 ("The Supreme Court has yet to explicate the degree of relatedness necessary to support specific jurisdiction over a nonresident defendant."); *Vons Cos.*, 926 P.2d at 1096 n.4 ("[t]he high court has declined to clarify the relatedness element of specific jurisdiction"); *Thomason*, 661 A.2d at 599-600 ("In the context of 'specific' jurisdiction, although the United States Supreme Court has required the plaintiff's cause of action to 'arise out of or relate to' the defendant's forum-directed activities, that court has not articulated a standard for what constitutes 'arising out of.'"); Maloney, *supra*, at 1265-66 ("A particularly troublesome problem that courts face today is the confusion and inconsistency of the requirement that a cause of action 'arise from or relate to' the defendant's contacts with the forum state in order for a court to assert specific personal jurisdiction. With the United States Supreme Court's refusal to consider the issue in *Shute v. Carnival Cruise Lines*, it appears that the

confusion will persist."). One recent academic commentator succinctly expressed the frustrations of the bench, bar, and academy on the lack of guidance on the nexus issue:

> [A]fter turning the page on a new century, the legal community is no closer to resolving this [nexus] conundrum than we were in 1988. Many legal scholars thought that the Court would finally address the issue when it accepted certiorari in *Carnival Cruise Lines v. Shute*, only to be disappointed when the Court dodged the minimum contacts issue by enforcing a flimsy forum selection clause hidden in the small print of a form contract. One can only hope that the Supreme Court has not issued its final word on the subject and that it is merely waiting for the appropriate case to answer some of the nagging questions that exist regarding the personal jurisdiction doctrine. * * * Notwithstanding the Court's lack of direction—or possibly because of it—lower courts and commentators have struggled to give meaning to the nexus requirement.

Simard, *supra*, at 347-48.

G. This Case Presents An Excellent Vehicle For Resolving The Nexus Question.

This petition squarely presents an opportunity to resolve a conspicuously open question in the Court's personal jurisdiction cases: Does the Due Process Clause permit a State to exercise specific personal jurisdiction over a nonresident defendant when the plaintiff's cause of action "relates to" the defendant's

forum contacts, but does not "arise out of" those contacts?

Although the majority in this case acknowledged that McNamee had traveled to Texas approximately thirty-five times to train Clemens and other professional athletes, App. 2a, the majority erroneously deemed those trips irrelevant because Clemens's defamation claim did not "arise" from them: "In this case, the relevant contacts from which Clemens' [sic] cause of action arises are the allegedly defamatory remarks about Clemens which McNamee made to the Mitchell Commission and John Heyman of SI.com." App. 6a-7a (emphasis added); *see* App. 16a (Haynes, J., dissenting) ("[T]he majority opinion treats the thirty-five business trips discussed above as irrelevant . . . .").

Judge Haynes's dissent focused on the "related to" portion of the specific jurisdiction test. "[S]pecific jurisdiction may be asserted over a defendant where that defendant has purposefully directed his activities at the forum state and the litigation results from alleged injuries that arise out of or *relate to* those activities." App. 12a (Haynes, J., dissenting) (emphasis in original; quotations omitted). Next, Judge Haynes detailed how Clemens's defamation claim "related to" McNamee's business trips to Texas to train Clemens:

- McNamee made numerous business trips to Texas to train Clemens, and these trips 'relate to' and form an integral part of the instant cause of action.

- McNamee's business trips to Texas form a part of and 'relate to' the training relationship from which the alleged steroid regimen either arose (McNamee's version) or did not arise (Clemens's version).

- [T]he litigation in question here clearly 'relates to' McNamee's business trips to Texas because the allegedly defamatory statements relate to McNamee's training relationship with Clemens.

- McNamee should reasonably anticipate being haled into a Texas court for matters 'relating to' his services as Clemens's personal trainer, including his statements that Clemens used steroids as part of his training regimen.

- McNamee's numerous visits to Texas were business contacts with Clemens in the course of the very training relationship that did—or did not—give rise to the steroid use.

- [W]ere this case to proceed to trial, McNamee and Clemens would no doubt testify extensively regarding their training relationship, including the relationship in Texas, both in the off-seasons and while Clemens played with the Houston Astros.

- Accordingly, I conclude that the first prong of the specific jurisdiction inquiry is satisfied because McNamee's business contacts with Texas relate to this litigation and were more than 'minimum.'

App. 12a-15a, 20a, 24a (Haynes, J., dissenting). In light of Judge Haynes's dissent, the majority did not—and could not—suggest that Clemens's defamation claim did not "relate to" McNamee's Texas business contacts. Thus, this case presents the precise nexus issues flagged—but not decided—by the Court in *Helicopteros*. *See Helicopteros*, 466 U.S. at 415 n.10.

The Court should use this case to finally resolve the specific personal jurisdiction nexus question that has long-plagued the lower courts.

II. *Calder*'s "Express Aiming" Requirement Has Divided The Lower Courts.

In *Calder v. Jones*, 465 U.S. 783, 791 (1984), this Court held that the Due Process Clause permitted California to exercise personal jurisdiction over nonresident defendants in a defamation case "because of their intentional conduct in Florida calculated to cause injury to respondent [Shirley Jones] in California." Important to the Court's decision was its conclusion that the defendants had "expressly aimed" their intentional actions at California. *Id.* at 789. The intentional conduct which occurred in Florida consisted of writing and editing an article in a national magazine which alleged that Jones drank so heavily that it prevented her from fulfilling her professional obligations. *Id.* at 789 n.9. *Calder* noted that the article concerned Jones's California activities and was drawn from California sources. *Id.* at 789.

The court of appeals below split 2-1 on the meaning of *Calder*'s reference to the content and sources of the defamatory article. The majority held that *Calder*'s "express aiming" requirement cannot be satisfied when

the defamatory statement does not refer to the plaintiff's forum activities and is not drawn from forum sources:

> We read *Calder* as requiring the plaintiff seeking to assert specific personal jurisdiction over a defendant in a defamation case to show '(1) the subject matter of and (2) the sources relied upon for the article were in the forum state.'

App. 9a. Thus, because McNamee did not accuse Clemens of using steroids in Texas, Texas could not exercise specific personal jurisdiction over McNamee for Clemens's defamation claim. *See id.*

Judge Haynes strongly disagreed with the majority's interpretation of *Calder*. She noted in dissent that "focusing exclusively on the setting of McNamee's allegedly defamatory statements, the majority opinion unduly narrows the minimum contacts and specific jurisdiction inquiry to a mechanical or technical formulation, rather than the 'highly realistic' approach urged by the Supreme Court." App. 24a (Haynes, J., dissenting) (quoting *Burger King*, 471 U.S. at 478-79 ("The Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests or on 'conceptualistic . . . theories' . . . . Instead, we have emphasized the need for a 'highly realistic' approach . . . .")). Judge Haynes recognized that it made no sense to deem dispositive the false content of McNamee's defamatory statement: "Clemens denies that any such injections occurred—in Texas, New York, or anywhere else. Given the fact that we must assume for purposes of this analysis that Clemens's version of the facts is the true one, the 'New

York' situs of this case is based entirely upon a lie." App. 16a. Finally, Judge Haynes recognized that the majority's construction of *Calder* artificially and arbitrarily restricted specific jurisdiction jurisprudence in defamation cases:

> In relying entirely on the alleged libelant to fix the situs of suit, the majority opinion greatly limits specific jurisdiction jurisprudence in general and its application to libel cases in particular. * * * As a result of the majority opinion's test, McNamee could force Clemens to litigate his defamation action in a foreign state simply by omitting reference to Texas,[2] staging the false story elsewhere, or declining to research his allegations in Texas.

Id.; App. 18a.

Like the majority and dissenting opinions below, other lower courts have also disagreed over *Calder*'s "express aiming" requirement. *See Tamburo v. Dworkin*, 601 F.3d 693, 704 (7th Cir.) ("Some courts have read *Calder*'s 'express aiming' requirement fairly broadly, requiring only conduct that is 'targeted at a plaintiff whom the defendant knows to be a resident of the forum state. . . . Others have read it more narrowly to require that the forum state be the focal

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[2] McNamee's defamatory statement to SI com in fact omitted any reference to Texas or any other location: "And Roger was in no way an abuser of steroids. He never took them through our tough winter workouts. And he never took them in spring training, when the days are longest. He took them in late July, August, and never for more than four to six weeks max . . . it wasn't that frequent." App. 98a.

point of the tort.'"), *cert. denied*, 131 S.Ct. 567 (2010). More specifically, the lower courts have divided on what role, if any, the content and sources of a defamatory statement should play in *Calder*'s "express aiming" analysis.

The Ninth and Tenth Circuits have concluded that *Calder* does not require that a defamatory statement refer to the plaintiff's forum activities or be drawn from forum sources before specific personal jurisdiction may be exercised over a nonresident defamation defendant. *See Gordy v. Daily News, L.P.*, 95 F.3d 829, 831, 833 (9th Cir. 1996) (holding *Calder* satisfied and specific personal jurisdiction existed in California even though "[t]he events reported in the allegedly defamatory article did not take place in California, nor did the article mention California."); *Burt v. Board of Regents of the University of Nebraska*, 757 F.2d 242, 244-45 (10th Cir. 1985) (holding *Calder* satisfied and specific personal jurisdiction existed in Colorado in the face of a vigorous dissent that the case presented "but half a *Calder*" because "[t]he [defamatory] letter was about what had taken place in Nebraska not Colorado [and] [t]he story was certainly not drawn from Colorado sources."). This Court granted a petition for a writ of certiorari to review the Tenth Circuit's decision in *Burt*, *see Connolly v. Burt*, 474 U.S. 1004 (1985), but did not decide the issue because the judgment was vacated as moot. *Id.*, 475 U.S. 1063 (1986).

Taking a different approach, in addition to the Fifth Circuit's decision in this case, the Sixth Circuit has held that the exercise of specific personal jurisdiction over a nonresident defamation defendant cannot satisfy *Calder* unless the content and sources

of the defamatory statement are connected to the forum. *See Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110, 1120 (6th Cir. 1994) (holding *Calder* was not satisfied and no specific personal jurisdiction existed in Ohio because the defamatory statement did not concern Ohio activities of the plaintiff and the source of the defamatory statement was not Ohio).

Legal scholars have criticized courts, like the Fifth and Sixth Circuits, that hold the content of a defamatory statement controls *Calder*'s "express aiming" requirement:

> [T]he court's failure to explain why defamatory comments that mention, or are about, the forum state should count for more jurisdictionally than comments that defame the plaintiff in more generic terms, only adds to the confusion. . . . A test which focuses on the content of the defamation confuses a substantive law concern with a jurisdictional one. Jurisdiction is about contacts with a forum, not comments about it, and comments do not have a greater connection with a forum simply because they mention or discuss it (or fail to). . . . [A] defamatory comment that harms a state resident's reputation has the same degree of connection with, or effect in, the state whether it refers to the state or not. The content of a comment adds nothing to its degree of forum accessibility or connectedness.

Condlin, Robert J., *"Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard*

Once Again, 54 CATH. U. L. REV. 53, 143-45 (Fall 2004); *accord* Borchers, Patrick J., *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473, 485 (Winter 2004) (criticizing a court's attempt to distinguish *Calder* on the ground that the content of the defamatory statement did not refer to the plaintiff's forum activities).

In sum, the Fifth Circuit's misapplication of *Calder*'s "express aiming" requirement has resulted in an illogical holding that the false content of McNamee's defamatory statement controls the due process analysis. The Court should take this case to rectify this injustice and resolve the long-standing dispute among the lower courts regarding *Calder*'s "express aiming" requirement.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-20625

[Filed August 12, 2010]

WILLIAM ROGER CLEMENS,	)
	)
Plaintiff – Appellant,	)
	)
v.	)
	)
BRIAN McNAMEE,	)
	)
Defendant – Appellee.	)
	)

Appeal from the United States District Court
for the Southern District of Texas

Before DAVIS, SMITH, and HAYNES, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge.

In this appeal, we consider whether allegedly defamatory statements made elsewhere but which caused damage to the plaintiff in the forum state are sufficient to confer personal jurisdiction over the

defendant when the content and context of the statements lack any connection with the forum state. For the following reasons, we agree with the district court that the plaintiff failed to establish personal jurisdiction over the defendant and affirm.

I.

The plaintiff, Roger Clemens, moved to Texas in 1977 at the age of fifteen. In 1983, after playing college baseball for the University of Texas, he was drafted by the Boston Red Sox, a Major League Baseball team. Clemens played for the Red Sox until 1996, when he signed with the Toronto Blue Jays. As a member of the Blue Jays, Clemens met the defendant Brian McNamee, an athletic trainer for the Toronto organization. In 1999, Clemens joined the New York Yankees, and one year later, the Yankees hired McNamee as an assistant trainer. Clemens trained with McNamee until some point in 2007.[1] Over the course of their professional relationship, McNamee traveled to Texas approximately thirty-five times to train Clemens and other professional athletes. Although he temporarily resided in other cities during his professional baseball career, Clemens returned to Houston at the end of every baseball season. He currently lives in Texas with his wife and four children.

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[1] Clemens retired from the Yankees in 2003. In 2004, he joined the Houston Astros and played with the team for three seasons. In 2007, he signed a one-year contract with the Yankees At present, he is not a member of any professional baseball team.

In the summer of 2007, federal authorities contacted McNamee in New York City in connection with the Government's criminal investigation of BALCO, a Bay Area laboratory allegedly involved in the development and sale of performance-enhancing drugs. At the interview, authorities told McNamee that the Government had sufficient evidence to secure a conviction against McNamee for delivering illegal performance-enhancing drugs to athletes. In lieu of prosecution, the United States Attorney's Office for the Northern District of California gave McNamee use immunity for any statements he gave in relation to the Government's investigation. McNamee was interviewed by the Government for two days during which he told investigators that he had injected Clemens with performance-enhancing drugs in 1998, 2000, and 2001. These injections, according to McNamee, took place in Toronto and New York.

A short time after his interview with the Government, federal authorities contacted McNamee again, this time requesting that he cooperate with a Major League Baseball investigation being conducted by former United States Senator George Mitchell into the use of performance-enhancing drugs in the game ("Mitchell Commission"). Federal investigators arranged and participated in McNamee's meeting with Mitchell in New York. On December 12, 2007, the Mitchell Commission released the findings of its investigation in its *Report to the Commissioner of Baseball of an Independent Investigation Into the Illegal Use of Steroids and Other Performance Enhancing Substances By Players In Major League Baseball* ("Mitchell Report"). The Mitchell Report included McNamee's statements concerning Clemens' use of performance-enhancing drugs. Every national

news service, as well as every major newspaper in Texas, republished McNamee's statements. Following the Mitchell Report's release, McNamee spoke with John Heyman, a senior writer for the internet site SI.com. During this interview at McNamee's house in Queens, New York, McNamee repeated the statements that had been published in the Mitchell Report. Heyman posted an article containing these statements to the website SI.com on January 7, 2008.

In January 2008, Clemens filed suit for defamation against McNamee in Texas state court. McNamee removed the action to the United States District Court and moved to dismiss Clemens' complaint for *inter alia* lack of personal jurisdiction and failure to state a claim. The district court dismissed Clemens' defamation action for lack of personal jurisdiction because the focal point of McNamee's statements about Clemens was not Texas. The district court also found, in the alternative, that if the court had personal jurisdiction over McNamee, his statements to the Mitchell Commission were cloaked with absolute immunity. This appeal followed.

II.

A.

Whether the district court can properly exercise personal jurisdiction over the defendant is an issue of law we review *de novo*. *Felch v. Tranportes. Lar-Mex S.A. de C.V.*, 92 F.3d 320, 324 (5th Cir. 1996). The plaintiff bears the burden of establishing personal jurisdiction over a non-resident defendant and that burden is met by making a *prima facie* showing. *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 854

(5th Cir. 2000). We must accept the plaintiff's uncontroverted allegations as true, and resolve in his favor all conflicts between the facts contained in the parties' affidavits and other documentation. *Revell v. Lidov*, 317 F.3d 467, 469 (5th Cir. 2002) (citation omitted).

B.

A federal district court sitting in diversity may exercise personal jurisdiction over a foreign defendant if (1) the long-arm statute of the forum state creates personal jurisdiction over the defendant; and (2) the exercise of personal jurisdiction is consistent with the due process guarantees of the United States Constitution. *Latshaw v. Johnston*, 167 F.3d 208, 211 (5th Cir. 1999). Because Texas's long-arm statute reaches to the constitutional limits, the question we must resolve is whether exercising personal jurisdiction over the defendant offends due process. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413–14 (1984).

The Due Process Clause of the Fourteenth Amendment permits a court to exercise personal jurisdiction over a foreign defendant when (1) that defendant has purposefully availed himself of the benefits and protections of the forum state by establishing minimum contacts with the forum state and (2) the exercise of jurisdiction over that defendant does not offend traditional notions of fair play and substantial justice. *Revell*, 317 F.3d at 470 (footnotes and internal citation omitted). There are two types of minimum contacts: contacts that give rise to specific personal jurisdiction and those that give rise to general jurisdiction. *Wilson v. Belin*, 20 F.3d 644, 647

(5th Cir. 1994). On appeal, Clemens only argues that McNamee's defamatory statements were sufficient to confer specific personal jurisdiction; accordingly, we only examine whether McNamee's contacts with Texas were sufficient to confer jurisdiction under the Supreme Court and this Circuit's specific personal jurisdiction jurisprudence. Specific jurisdiction exists when "the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that arise out of or relate to those activities." *See Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citations omitted); *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1068 n.9 (5th Cir. 1992). The non-resident's purposefully directed activities in the forum must be such that he could reasonably anticipate being haled into court in the forum state. *Burger King*, 471 U.S. at 474. Specific jurisdiction also requires a sufficient nexus between the non-resident's contacts with the forum and the cause of action. *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 414 n.8.

We first address whether McNamee had sufficient minimum contacts with the forum to support specific personal jurisdiction. It is essential that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities with the forum state, thus invoking the benefits and protections of its laws. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. *Burger King*, 471 U.S. at 472 (citation omitted). In this case, the relevant contacts from which Clemens' cause of action arises are the allegedly defamatory remarks about Clemens which McNamee made to the Mitchell

Commission and John Heyman of SI.com. Therefore, the issue narrows to whether these defamatory remarks constituted purposeful availment such that McNamee could have reasonably anticipated being haled into a Texas court as a result of his statements.

The most instructive case on this issue from the Supreme Court is *Calder v. Jones*, 465 U.S. 783 (1984). In *Calder*, a Hollywood gossip tabloid published an allegedly libelous story about the actress Shirley Jones. *Id.* at 785. Jones filed suit in California against the author of the story and the editor of the tabloid. *Id.* The Supreme Court held that California courts had jurisdiction over the defendants because they had "expressly aimed" their conduct towards California:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and the harm.

Id. at 788-89 (emphasis added).

To support personal jurisdiction against the defaming defendant, this court has emphasized *Calder*'s requirement that the forum "be the focal point of the story." *Id.* For example, in *Revell v. Lidov*, the plaintiff sued a non-resident defendant in Texas after the defendant alleged on a Columbia University website that the plaintiff had advance knowledge of

the bombing of Pan Am Flight 103. *Revell*, 317 F.3d at 469. Although we recognized that the plaintiff suffered emotional distress and damage to his professional reputation in Texas, the *Revell* court concluded that the alleged defamatory statements were inadequately directed to Texas to satisfy minimum contacts under *Calder*. *Id.* at 473. As this court explained:

> First, the article written by [plaintiff] about [defendant] contains no reference to Texas, nor does it refer to the Texas activities of [plaintiff] and it was not directed at Texas readers as distinguished from readers in other states. Texas was not the focal point of the article or the harm suffered, unlike *Calder*, in which the article contained descriptions of the California activities of the plaintiff, drew upon California sources, and found its largest audience in California.

Id.

In *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005), we again required the plaintiff to show that Texas was the focus of the defamatory communication. In *Fielding*, the plaintiffs were the Swiss Ambassador to Germany and his American wife, a former Mrs. Texas who was a resident of Texas; the defendants were several German newspapers who wrote allegedly libelous articles about the plaintiffs' social lives in Berlin. *Id.* The plaintiffs sued the defendants in Texas, arguing that jurisdiction was proper because the stories harmed their reputation among friends and family in Texas. *Id.* at 424. Despite the alleged harm suffered in the forum, the *Fielding* court declined to find personal jurisdiction because

"the clear focus of the . . . articles was the alleged affair between [the Ambassador] and [his alleged mistress] and its aftermath, activities which occurred in Germany and Switzerland." *Id.* at 426.

We read *Calder* as requiring the plaintiff seeking to assert specific personal jurisdiction over a defendant in a defamation case to show "(1) the subject matter of and (2) the sources relied upon for the article were in the forum state." *Id.* (citing *Revell*, 317 F.3d at 474 & n.48). Thus the question in this case further narrows to whether McNamee's allegedly defamatory statements were aimed at or directed to Texas. As in *Revell* and *Fielding*, the statements in this case concerned non-Texas activities–the delivery of performance-enhancing drugs to Clemens in New York and Canada. The statements were not made in Texas or directed to residents of Texas.

In support of jurisdiction, Clemens points to the harm he suffered in Texas and to McNamee's knowledge of the likelihood of such damage in the forum. Yet under *Calder*, *Revell*, and *Fielding*, Clemens has not made a prima facie showing that McNamee made statements in which Texas was the focal point: the statements did not concern activity in Texas; nor were they made in Texas or directed to Texas residents any more than residents of any state. As such, the district court did not err in dismissing Clemens' suit for lack of personal jurisdiction over McNamee.[2]

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[2] *See also Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 401 (5th Cir. 2009) ("Under 2 *Calder*, . . . the plaintiff's residence in the forum, and suffering of harm there, will not alone support [personal]

III.

For the foregoing reasons, the district court's judgment is affirmed.

AFFIRMED.

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jurisdiction.") (brackets in original, citation omitted), *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 870 (5th Cir. 2001) ("If we were to accept Appellants' arguments, a nonresident defendant would be subject to jurisdiction in Texas for an intentional tort simply because the plaintiff's complaint alleged injury in Texas to Texas residents regardless of the defendant's contacts "); *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 212 (5th Cir. 1999) (citations omitted) (foreseeable injury alone is not sufficient to confer specific jurisdiction, absent the direction of specific acts toward the forum).

HAYNES, Circuit Judge, dissenting.

Because I conclude that specific jurisdiction exists here, I respectfully dissent. McNamee had sufficient minimum contacts with Texas, and the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice. Accordingly, the district court should not have dismissed this case on that ground.[1]

The Due Process Clause of the Fourteenth Amendment requires that, before a person can be subject to jurisdiction in a particular forum, he must have "purposefully availed himself of the benefits and protections of the forum state by establishing 'minimum contacts' with the forum state; and . . . the exercise of jurisdiction over that defendant [must] not offend 'traditional notions of fair play and substantial justice.'" *Cent. Freight Lines Inc. v. APA Transp. Corp.*, 322 F.3d 376, 380 (5th Cir. 2003). In turn, minimum contacts can be broken down into two categories: those sufficient to support specific jurisdiction and those sufficient to support general jurisdiction. *Id.* at 381. Only the former concerns us here, as I agree that McNamee's contacts were not sufficient for general jurisdiction.

In construing Supreme Court precedents in this area, we have held that specific jurisdiction may be asserted over a defendant where that defendant has

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[1] The majority opinion does not reach the question of the district court's alternative holding on the immunity question for the Mitchell Commission statements, so I will not address that question here.

"'purposefully directed [his] activities at the forum state and the litigation results from alleged injuries that arise out of or *relate to* those activities.'" *Id.* (emphasis added) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). In analyzing whether personal jurisdiction is proper, we "must accept the plaintiff's uncontroverted allegations, and resolve in his favor all conflicts between the facts contained in the parties' affidavits and other documentation." *Revell v. Lidov*, 317 F.3d 467, 469 (5th Cir. 2002) (quotation marks, brackets, and citation omitted).

A. McNamee Established Minimum Contacts with Texas

In this case, there are two independent grounds upon which the minimum contacts inquiry is satisfied. First, McNamee made numerous business trips to Texas to train Clemens, and these trips "relate to" and form an integral part of the instant cause of action. Second, under the *Calder*[2] "effects test," McNamee established minimum contacts with Texas because, taking Clemens's allegations as true, McNamee intentionally directed his false claims at Texas, where he knew Clemens resided and where it was foreseeable that the brunt of the injury from McNamee's statements would be felt.

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[2] *Calder v. Jones*, 465 U S. 783 (1984)

1. McNamee's Business Contacts with Texas Satisfy the Minimum Contacts Test

Unlike the cases upon which the majority opinion relies, McNamee had repeated business contacts with Clemens in Texas. As the majority opinion acknowledges, McNamee visited Texas approximately thirty-five times over the course of his paid, professional relationship with Clemens, each time to train Clemens and other professional athletes. The fact that these training sessions occurred in Texas is not fortuitous: McNamee traveled to Texas because that is where Clemens continuously resided during the off-season and because, for at least part of his career, Clemens played professional baseball in Texas.[3] Thus, McNamee purposely availed himself of the privileges of conducting business in Texas. *See Nuovo Pignone, SPA v. Storman Asia M/V*, 310 F.3d 374, 380 (5th Cir. 2002) (holding that minimum contacts exist where the defendant "purposely has availed itself of the privilege of conducting business in that state"); *Stroman Realty, Inc. v. Antt*, 528 F.3d 382, 386 (5th Cir. 2008) ("Purposeful availment of the privileges of conducting business in a forum is indicative that a defendant has contacts with a state.").

Further, McNamee's business trips to Texas form a part of and "relate to" the training relationship from which the alleged steroid regimen either arose (McNamee's version) or did not arise (Clemens's

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[3] Notably, McNamee served as Clemens's personal trainer during the three years that Clemens played for the Houston Astros. Clemens asserts that this time period was the height of his professional career. He left the Astros only a year before the allegedly libelous statements were made

version). *See Trinity Indus., Inc. v. Myers & Assocs., Ltd.*, 41 F.3d 229, 231 (5th Cir. 1995). In *Trinity Industries*, two lawyers allegedly counseled a Texas client's competitor to bring adverse litigation in Pennsylvania. The Texas client brought suit in Texas court, claiming breach of fiduciary duty, civil conspiracy, and negligence. We rejected the defendants' contention that personal jurisdiction was lacking because the tortious conduct occurred in Illinois—where the defendants' law firm was located—and in Pennsylvania—where the tortious advice was given. Concluding that the lawsuit related to the defendants' contacts with Texas, we observed: "The essence of Trinity's complaint is that its own lawyers counseled its competitor in bringing adverse litigation. There would be no injury or basis for a claim but for the fact that [the defendants] represented Trinity in Texas before and during their engagement by [the competitor]." *Id.* at 231-32.

Similarly, the litigation in question here clearly "relates to" McNamee's business trips to Texas because the allegedly defamatory statements relate to McNamee's training relationship with Clemens. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 & n.8 (1984) ("When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of *in personam* jurisdiction.") (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). As discussed above, McNamee's background as Clemens's trainer, in both Texas and New York, is what put McNamee in a position to—in his words—give Clemens steroids and, further, made him a credible person of interest to the various

investigatory bodies and a news organization such as SI.com. *See Trinity Indus.*, 41 F.3d at 231-32. Accordingly, McNamee should reasonably anticipate being haled into a Texas court for matters "relating to" his services as Clemens's personal trainer, including his statements that Clemens used steroids as part of his training regimen.

The fact that McNamee's training relationship with Clemens extended beyond Texas's borders does not deprive the district court of specific jurisdiction. Neither the Supreme Court nor this court has ever required the tortious conduct to occur exclusively in or be exclusively related to the forum state. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984) ("[R]espondent is carrying on a *'part of its general business'* in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, *in part*, in New Hampshire.") (emphasis added); *Walk Haydel & Assocs., Inc. v. Coastal Power Prod. Co.*, 517 F.3d 235, 244 (5th Cir. 2008) (rejecting defendant's argument that personal jurisdiction was improper because most of the relevant contacts occurred outside the forum state); *Streber v. Hunter*, 221 F.3d 701, 718 (5th Cir. 2000) (holding that specific jurisdiction was proper where "at least some of the allegations forming the basis of this lawsuit arise out of [the defendant's] contacts with Texas"). Accordingly, I conclude that the first prong of the specific jurisdiction inquiry is satisfied because McNamee's business contacts with Texas relate to this litigation and were more than "minimum."

2. The Calder "Effects" Test Is Not a Limitation on the Ordinary Minimum Contacts Analysis

In contrast, the majority opinion treats the thirty-five business trips discussed above as irrelevant and focuses entirely on the location of the alleged steroid injections in New York. Of course, Clemens denies that any such injections occurred—in Texas, New York, or anywhere else. Given the fact that we must assume for purposes of this analysis that Clemens's version of the facts is the true one, the "New York" situs of this case is based entirely upon a lie. McNamee could just as easily have named any other state as far as Clemens's position in this case is concerned. In relying entirely on the alleged libelant to fix the situs of suit, the majority opinion greatly limits specific jurisdiction jurisprudence in general and its application to libel cases in particular.

The majority opinion's formulation of the *Calder* effects test—requiring a plaintiff to show that (1) the subject matter of the defamatory statements concerned the forum; and (2) the sources relied upon by the author were in the forum—results in a mechanical personal jurisdiction test for defamation and libel cases that is both over- and under-inclusive. Two examples demonstrate this point.

In the first example, assume the same underlying facts present in this case, except that McNamee falsely stated that he injected Clemens with performance-enhancing drugs while at a truck stop in Montana. The majority's test would compel a conclusion that McNamee had purposefully availed himself of the laws of Montana because his defamatory statements concerned Montana and the focus of McNamee's story

was on events that allegedly occurred in Montana. This conclusion would perhaps follow even if Clemens denied ever visiting Montana, and McNamee had no other contacts with Montana. In such a scenario, the setting of the false statement—and thus the defendant's relationship to the forum state—is fortuitous, *see Burger King*, 471 U.S. at 475, yet sufficient to establish minimum contacts under the reasoning of the majority opinion.

In the second example, assume that Clemens played his entire professional career with the Houston Astros and that McNamee trained Clemens on a weekly basis in Texas.[4] Further assume, like we are required to here, that McNamee falsely stated that he injected Clemens with performance-enhancing drugs in New York, knowing that his statements would destroy Clemens's personal and professional reputation in Texas. Thus, the only relevant connection to New York in this hypothetical is McNamee's own false statement, and all other relevant contacts between McNamee and Clemens occur in Texas. Under the majority opinion's reasoning, personal jurisdiction in Texas in this example is improper because McNamee's statements did not concern Texas or rely on sources within Texas. McNamee's numerous business contacts with Texas, intent to harm Clemens in Texas, and knowledge that Clemens resided in Texas and would feel the brunt of the defamatory impact there would thus be insufficient to establish minimum contacts. The fact that McNamee did not research his allegations by

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[4] This hypothetical scenario also presumes that general jurisdiction over McNamee is unavailable.

consulting sources close to Clemens in Texas also becomes, under the majority opinion's analysis, a factor thwarting personal jurisdiction.[5] As a result of the majority opinion's test, McNamee could force Clemens to litigate his defamation action in a foreign state simply by omitting reference to Texas, staging the false story elsewhere, or declining to research his allegations in Texas.

These two contrasting examples demonstrate how the majority opinion misconstrues the *Calder* effects test as some sort of restriction in defamation or libel cases on the ordinary minimum contacts analysis. In truth, *Calder* was an expansion of specific jurisdiction and the minimum contacts inquiry. The *Calder* "effects test" was an outgrowth of the recognition that a defendant need not ever have been physically present in the forum state to be subject to personal jurisdiction there. *See Calder*, 465 U.S. at 789 ("An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.").

To understand this point, we must detour briefly back to the seminal case of *International Shoe v. Washington*, 326 U.S. 310 (1945), which first articulated the minimum contacts test as a way to establish jurisdiction over a defendant not physically

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[5] The "research" prong of *Calder*, *Revell*, and *Fielding* is irrelevant in this case because McNamee is not a journalist relying on external sources. He is the very person who claims to have committed the act which is the subject of the alleged libel. Unlike a journalist, such an alleged eyewitness would never be conducting "research" in Texas or anywhere else on whether he himself is telling the truth.

present in the state. The *International Shoe* Court recognized that a court's ability to exercise personal jurisdiction over a defendant historically required the defendant to be physically present in the forum. *Id.* at 316. Analyzing the physical presence concept, the *International Shoe* Court determined that a nonresident who had a random contact with the forum state should not be haled into court there on a matter unrelated to that contact, yet the absence of physical presence should not defeat jurisdiction for actions directed at the forum state. *Id.* at 316-18. Thus, while physical presence is not irrelevant to the jurisdictional analysis, it is not determinative of it either.

Understood against this backdrop, the *Calder* effects test is simply an additional, but not exclusive, vehicle for establishing personal jurisdiction over a nonresident defendant who may never have been to the forum state. *See Allred v. Moore & Peterson*, 117 F.3d 278, 287 (5th Cir. 1997) ("[T]he key to *Calder* is that the effects of an alleged intentional tort are to be assessed as part of the analysis of the defendant's relevant contacts with the forum. Whether these effects, either alone or in combination with other contacts, are sufficient to support in personam jurisdiction will turn upon the particular facts of each case.") (quoting *Wallace v. Herron*, 778 F.2d 391, 395 (7th Cir. 1985)). Put another way, *Calder* allows a court to find that a nonresident defendant who intentionally aims his or her tortious conduct at the forum state has established minimum contacts with the forum, even if the defendant has not established a physical presence there. *See Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 402 (5th Cir. 2009).

In this case, unlike *Calder*, *Revell*, and *Fielding*[6], we are not in need of proxies for physical presence. McNamee indeed visited Texas many times. These were not mere pleasure trips or trips where McNamee was merely "passing through" Texas on the way to somewhere else. Rather, McNamee's numerous visits to Texas were business contacts with Clemens in the course of the very training relationship that did—or did not—give rise to the steroid use. *See Trinity Indus.*, 41 F.3d at 231 (holding that the defendants' business contacts with Texas "indicate that the defendants deliberately availed themselves of the benefits of an ongoing relationship with a Texas client and reasonably should have anticipated the possibility of being haled into court in Texas for claims arising out of or related to that relationship"); *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir. 1990) (holding that personal jurisdiction over a California doctor was proper in Texas for claims related to the administration of an experimental medical program in California because, in the aggregate, the doctor maintained numerous business contacts with patients, including the plaintiff, in Texas). In sum, McNamee's business relationship with Clemens in Texas establishes sufficient minimum contacts with Texas to support specific jurisdiction for this lawsuit, even without considering the *Calder* effects test.

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[6] *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005).

3. McNamee Has Minimum Contacts with Texas Under the Calder *Effects Test*

However, even if Clemens must meet the *Calder* requirements, he has done so. It is undisputed that Clemens is a resident of Texas with many civic and business activities in that state. In addition to his residency in Texas, Clemens played baseball for the Houston Astros for three years shortly before the events in question. Taking Clemens's allegations in the complaint as true, McNamee intended to cause particular harm to Clemens in Texas because he was aware that Clemens resided in Texas and that the brunt of the impact of his statements would be felt by Clemens in Texas. This conduct constitutes the kind of "deliberate targeting" that the *Calder* Court found dispositive in analyzing personal jurisdiction.

In *Calder*, the National Enquirer published an article alleging that Shirley Jones, a nationally-known actress, drank alcohol so heavily as to interfere with her professional obligations as an actress. 465 U.S. at 789 n.9. Jones sued both the author and the editor of the article in California state court. The Court found that, despite the limited or total absence of physical connections between the defendants and the forum state, personal jurisdiction over the defendants was "proper in California based on the 'effects' of their Florida conduct in California." *Id.* at 789. The Court emphasized that the defendants' "intentional, and allegedly tortious, actions were expressly aimed at California" because the defendants knew the devastating impact the article would have upon Jones, and that the brunt of the injury would be felt by Jones in California, where she lived and worked. *Id.* at 789-90.

Thus, under *Calder*, personal jurisdiction is appropriate over McNamee because McNamee knew that Clemens resided and worked in Texas and that Clemens would feel the brunt of the impact of his allegedly defamatory statements in Texas. *See Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988) ("In *Calder*, the Supreme Court held that when an alleged tort-feasor's intentional actions are expressly aimed at the forum state, and the tort-feasor knows that the brunt of the injury will be felt by a particular resident in the forum, the tort-feasor must reasonably anticipate being haled into court there to answer for its tortious actions."); *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 628 (5th Cir. 1999) ("Even an act done outside the state that has consequences or effects within the state will suffice as a basis for jurisdiction in a suit arising from those consequences if the effects are seriously harmful and were intended or highly likely to follow from the nonresident defendant's conduct."); *Brown v. Flowers Indus., Inc.*, 688 F.2d 328, 333 (5th Cir. 1982) (holding that specific personal jurisdiction existed in defamation action even though the non-resident defendant was not present in the forum state, but concluding that, "[i]f, as is alleged in this case, [the defendant] causes injury in [the forum state], he is covered by the [long-arm] statute").

For his part, McNamee does not dispute that Clemens suffered particular injury in Texas as a result of McNamee's allegations. Instead, McNamee contends, and the majority opinion apparently agrees, that because he said the steroid injections occurred only in New York, this case has no connection to Texas, citing *Revell* and *Fielding*.

However, unlike *Revell*, where the defendant was unaware of the plaintiff's residence, here McNamee was acutely aware of Clemens's relationship to Texas from his visits there and from his overall training relationship with Clemens. Further, the defendant in *Revell* had no relevant contacts with Texas and no other facts demonstrated that the defendant had intentionally directed his allegedly tortious conduct toward the plaintiff in Texas. In this case, McNamee's training relationship with Clemens in Texas and his knowledge that Clemens resided and had recently played professional baseball in his home state of Texas demonstrate that McNamee purposefully directed his allegedly defamatory statements at Clemens's personal and professional reputation in Texas. *See Revell*, 317 F.3d at 475-76 (observing that knowledge of the forum at which the defendant's conduct is directed will often provide sufficient evidence that the forum is the focal point of the tortious activity).

Similarly, *Fielding* is inapposite. In *Fielding*, the plaintiffs were living overseas in the Swiss embassy in Germany. The court observed that it was unclear if and when the appellants ever lived in Texas because "during virtually the entire time relevant to this lawsuit, [the appellants] appear to have been residents of Germany." 415 F.3d at 423-24 n.2. The allegedly libelous articles focused on the appellants' social lives in Germany, and the brunt of the injuries suffered by the appellants occurred overseas. In contrast, Clemens's life is anchored in Texas, and McNamee was well aware of this fact at the time he made the allegedly defamatory statements about Clemens. Further, unlike the German newspaper at issue in *Fielding*, which was unlikely to be read in Texas, SI.com is widely available and likely to be read by

Clemens's fan base in Texas. In short, the SI.com publication is much more similar to the publication at issue in *Calder*, where the Court found personal jurisdiction over the nonresident defendant.

By focusing exclusively on the setting of McNamee's allegedly defamatory statements, the majority opinion unduly narrows the minimum contacts and specific jurisdiction inquiry to a mechanical or technical formulation, rather than the "highly realistic" approach urged by the Supreme Court. *Burger King*, 471 U.S. at 478-79 ("'The Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests or on 'conceptualistic . . . theories' . . . . Instead, we have emphasized the need for a 'highly realistic' approach . . ."); *Int'l Shoe Co.*, 326 U.S. at 319 ("It is evident that the criteria by which we mark the boundary line . . . cannot be simply mechanical or quantitative. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws . . ."). Indeed, were this case to proceed to trial, McNamee and Clemens would no doubt testify extensively regarding their training relationship, including the relationship in Texas, both in the off-seasons and while Clemens played with the Houston Astros. The scope of the trial certainly would not be limited to the events that did or did not transpire in New York on the particular dates alleged by McNamee. Employing the "highly realistic" approach advocated by the Supreme Court, Clemens has alleged sufficient facts to show that McNamee intentionally directed his allegedly defamatory remarks at Clemens's personal and professional reputation in Texas.

Thus, I would conclude that McNamee had sufficient minimum contacts with Texas under the *Calder* effects test because McNamee was aware that Clemens resided and worked in Texas and that the brunt of the impact of his defamatory statements would be felt by Clemens in Texas.

4. McNamee Had Minimum Contacts with Texas Sufficient to Support Specific Jurisdiction Here

Either considering only the business contacts by McNamee in Texas or considering the "effects test" of *Calder* under the facts alleged here, McNamee had sufficient minimum contacts with Texas. When both are combined, this conclusion becomes even more clear. *See Walk Haydel*, 517 F.3d at 243 ("W&S's purposeful contacts with Louisiana, in combination with the foreseeable harmful effects in Louisiana of its allegedly illegal activity, makes specific jurisdiction proper."); *see also Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 214 (5th Cir. 1999) ("In addition to the communications Brandt directed into Texas from outside of Texas, Brandt also visited Texas during 1989 at which time he allegedly gained from Tjontveit the confidential information he would later use against Wien Air."). Accordingly, I would conclude that McNamee had sufficient minimum contacts with Texas to make it reasonably foreseeable that he would be haled into a Texas court for this lawsuit.

B. Exercising Personal Jurisdiction Over McNamee in Texas Does Not Offend Traditional Notions of Fair Play and Substantial Justice

Finally, I would conclude that McNamee has failed to show that the exercise of personal jurisdiction over

him in this action would be unfair or unreasonable. In assessing the reasonableness of a court's exercise of personal jurisdiction, we examine five factors: (1) the burden upon the nonresident defendant to litigate in that forum; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the several states' shared interest in furthering substantive social policies. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

In this case, the burden upon McNamee to litigate the case in Texas would not be unfair. McNamee has repeatedly traveled to Texas, deliberately targeted his conduct toward Texas, and profited from his work in Texas. Further, we have repeatedly recognized that the forum state has a compelling interest in protecting its residents from tortious injuries by nonresidents. *See Walk Haydel*, 517 F.3d at 245. Similarly, Clemens has an equal, if not greater, interest in securing relief in his home state, where the brunt of the injury to his personal and professional reputation was sustained. Both Texas and New York would be efficient forums for resolution of this case. Texas's substantive policy of protecting its citizens from reputational injuries is greater than New York's interest in an event that, assuming for purposes of this analysis, did not occur.

Because I conclude that McNamee had established minimum contacts with Texas and that the exercise of personal jurisdiction would not violate traditional notions of fair play and substantial justice, I conclude that the district court should have exercised specific personal jurisdiction over McNamee. I respectfully dissent from the majority opinion's contrary decision.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-20625
D.C. Docket No. 4:08-CV-471

[Filed August 12, 2010]

WILLIAM ROGER CLEMENS,	)
	)
Plaintiff - Appellant,	)
	)
v.	)
	)
BRIAN MCNAMEE,	)
	)
Defendant - Appellee.	)
	)

Appeal from the United States District Court for the Southern District of Texas, Houston

Before DAVIS, SMITH, and HAYNES, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

HAYNES, Circuit Judge, dissenting:

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:08-cv-00471

[Filed June 30, 2009]

WILLIAM ROGER CLEMENS,	)
	)
Plaintiff,	)
	)
v.	)
	)
BRIAN MCNAMEE,	)
	)
Defendant.	)
	)

MEMORANDUM AND ORDER

Before the Court are Plaintiff's Motion to Reconsider (Doc. No. 66) and Motion to Supplement Motion to Reconsider. (Doc. No. 69.) After considering the parties' filings, all responses and replies thereto, and the applicable law, the Court finds that Plaintiff's Motion to Supplement Motion to Reconsider should be granted and his Motion to Reconsider should be denied.

I. PROCEDURAL BACKGROUND

This case arises out of Defendant's allegedly defamatory statements regarding Plaintiff's use of performance-enhancing drugs. The Court's previous order laid out the facts of the case in detail. Plaintiff accuses Defendant of falsely telling Andy Pettitte that Plaintiff had used steroids and human growth hormone (HGH). Plaintiff also alleges that Defendant made untruthful statements regarding Plaintiff's use of steroids and HGH to the Mitchell Commission and SI.com.

On February 12, 2009, the Court held that it could not exercise personal jurisdiction over Plaintiff's claims with respect to Defendant's alleged statements to the Mitchell Commission and SI.com. The Court further held that Defendant's statements to the Mitchell Commission should be immune from suit because they were made in the course of a government investigation. The Court also found that Defendant's statements to Pettitte did not constitute slander per se. Plaintiff now urges the Court to reconsider its decision.

II. ANALYSIS

A. Standard for Motion to Reconsider

A motion for reconsideration may be made under either Federal Rule of Civil Procedure 59(e) or 60(b). *Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 328 n. 1 (5th Cir. 2004). Such a motion must "clearly establish either a manifest error of law or fact or must present newly discovered evidence. These motions cannot be used to raise arguments which could, and should, have

been made before the judgment issued." *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005) (citing *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)). In considering a motion for reconsideration, a court "must strike the proper balance between two competing imperatives: (1) finality, and (2) the need to render just decisions on the basis of all the facts." *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993). Plaintiff does not specify the federal rule under which he urges his Motion. Because Plaintiff's Motion was filed more than ten days after the Memorandum and Order, and because there has not been a trial in this matter, the Court will apply the Rule 60(b) standard.

B. Immunity

Plaintiff questions the Court's holding that Defendant's statements to the Mitchell Commission should be immune because he made them during the course of a government investigation.[1] Plaintiff reasserts his position that Defendant's statements to the Mitchell Commission were made to a private individual conducting a private investigation. At the

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[1] As an initial matter, Plaintiff is not challenging the Court's holding regarding its lack of personal jurisdiction over Defendant with respect to his statements to Mitchell and SI.com. Therefore, regardless of whether the Court reconsiders its decision that Defendant's statements to Mitchell should be protected, it still cannot exercise jurisdiction over Plaintiff's claims regarding these statements.

The Court also notes that Plaintiff has correctly pointed out that *Thomas v. Bracey*, 940 S.W.2d 340 (Tex. App.–San Antonio 1997, no pet.), was a decision of the Texas Court of Appeals, not the Texas Supreme Court. The Court's previous misstatement, however, does not affect its ruling.

same time, Plaintiff recognizes that Defendant was speaking to the Mitchell Commission at the behest of the United States Attorney's Office (USAO) and the Federal Bureau of Investigation (FBI). Plaintiff then introduces a new policy argument, based on an article by Professor Frank Bowman published in Slate.com, and an article by sports writer Josh Peter, published on Yahoo Sports. (Pl. Mot. Ex. A-B.) These articles argue that it is dangerous to allow prosecutors to coerce witnesses "to speak publicly about matters that are the subject of a criminal investigation." (Pl. Mot. at 4.) Bowman opines that criminal defendants will have no forum in which to defend themselves when government entities influence the content of private sector reports. Plaintiff acknowledges that there is little this Court can do to control prosecutors who use such "questionable tactics"; nevertheless, Plaintiff argues that the Court should not "incentivize" such behavior. Plaintiff predicts that the ultimate result of the Court's decision is that there will be "nothing to stop the government from forcing individuals to go on the nightly news and accuse people of committing crimes the government never intends to prosecute." (Pl. Mot. at 6.) The government's admonition to witnesses that they must tell the truth, or face perjury charges, allows the government effectively to become "the sole arbiter of what is true and what is not." (Pl. Mot. at 7.)

Plaintiff cites no legal authority that is contrary to the Court's holding, which is based on the Fifth Circuit's decision in *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 994 (5th Cir. 1999). The *Shanks* Court held that a witness cannot be prosecuted for statements made during the course of a government investigation. The Fifth Circuit did not limit its holding to situations

where the government investigation ultimately leads to a prosecution.[2] As Defendant argues, immunity is meant to encourage witnesses to be candid when speaking with government officials who will ultimately decide what to do with the information they collect. The Court does not agree with Plaintiff's argument that perjury laws allow prosecutors to act as the sole arbiters of the truth; rather, these laws encourage reluctant witnesses who, like Defendant, have an economic incentive to be dishonest, to instead tell the truth. *See Darrah v. Hinds*, 720 S.W.2d 689, 691 (Tex. App.—Fort Worth, 1986, ref. n.r.e.) (citing *James v. Brown,* 637 S.W.2d 914, 917 (Tex. 1982)). Further, Plaintiff's concern about prosecutors' improper use of witness statements to destroy a suspect's reputation is not an issue before this Court. If Plaintiff believes that either the federal investigators or the Mitchell Commission overstepped the bounds of the law, he is free to bring suit against those entities, subject to

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[2] Texas courts have also applied judicial immunity to statements made "in contemplation of and preliminary to judicial proceedings." *See Daystar Residential, Inc. v. Collmer,* 176 S.W 3d 24, 28 (Tex App.—Houston [1st Dist.] 2004, pet. denied) (holding that attorney's statements made in anticipation of a proposed or existing judicial proceeding are immune from prosecution) (citing *Watson v Kaminski,* 51 S.W 3d 825, 827 (Tex. App.–Houston [1st Dist.] 200 1, no pet.) (same)). In Plaintiff's original briefing, he argued that the privilege applicable to statements made by attorneys is different from "witness privilege " The Court of Appeals in *Daystar,* however, while deciding facts involving an attorney's statement, noted that the judicial proceeding privilege "extends to any statements made by the judges, jurors, counsel, parties, or witnesses and attaches to all aspects of the proceedings, including statements made in open court, pre-trial hearings, depositions, affidavits, and any of the pleadings or other papers in the case " *Daystar,* 176 S.W.3d at 27.

possible immunity defenses. This Court, however, is solely concerned with the behavior of Defendant. The Court will not accept Plaintiff's invitation to thwart the government's allegedly coercive behavior by punishing Defendant, who was the target of that behavior.

Plaintiff then argues that the Court did not find, and that the evidence does not demonstrate, that Defendant's statements were made in the due course and furtherance of a federal investigation. Plaintiff contends that showing Defendant was coerced does not prove, functionally, how or why the interviews were in the due course and furtherance of the investigation. Plaintiff then points, once again, to a statement from former Senator George Mitchell, in which he claims that the USAO is not using the Mitchell Commissions' investigation to do their work for them. Plaintiff argues that having Defendant repeat statements to Mitchell does not further the USAO's investigation, and that Defendant's discussions with the Mitchell Commission only benefitted Defendant by preventing him from becoming a target. Plaintiff argues that, without evidence of how or why having Defendant speak to the Mitchell Commission furthered the federal investigation, this Court should not treat the interviews as part of it.

The cases cited by Plaintiff in which Texas courts found that statements were not related to the judicial proceeding are distinguishable from the facts before the Court. *Frith v. Shupp* involved a conversation between two parties to a pending lawsuit in which the defendant tried to dissuade the plaintiff from pursuing her claims. No. 05-01-01606-CV, 2002 WL 1981382 (Tex. App.—Dallas Aug. 29, 2002, no pet.). The parties

did not discuss the merits of the case or the possibility of settlement, and the conversation occurred in the defendant's private office. In the instant case, Defendant's conversation with the Mitchell Commission occurred in a law office, with attorneys, prosecutors, and law enforcement present. He discussed facts related to the government's investigation, and the discussion occurred at the government's direction. Plaintiff also cites *Burzynski v. AETNA Life Insurance Co.*, 967 F.2d 1063 (5th Cir. 1992). The plaintiff, a physician, sued the defendants who, during the discovery process of a state court lawsuit, sent a mass mailing to companies whose relationship to the litigation was "hypothetical at best" in which they sought to persuade the companies not to do business with the plaintiff. This case is likewise distinguishable because Defendant's statements were related to the govenment's investigation.

Plaintiff would require Defendant to explain how his statements furthered the government's investigation and to expose the prosecutor's motives for requiring him to speak to the Mitchell Commission in order to maintain his witness status. The Court does not believe that burden should be placed on Defendant. He has introduced an affidavit from an Assistant United States Attorney representing that Defendant's statements were compelled as part of an ongoing government investigation into the distribution of anabolic steroids, HGH, and money laundering, facts Plaintiff has not contested. (Doc. No. 63.) The Court finds this evidence to be sufficient.

Plaintiff has supplemented his motion for reconsideration with one new document, a government brief opposing the defendant's motion for new trial in

the case of *USA v. Tammy Thomas*, Docket Number 6-CR-0803, a prosecution pending in the Northern District of California. (Doc. No. 69, Ex. 1.)[3] Plaintiff submits this brief in support of his argument that prosecutors never intended to charge Plaintiff as part of the federal investigation. Plaintiff highlights the portions of the brief in which the government states that professional athletes are not targeted for mere steroid use.

In that case, Defendant Tammy Thomas, a former cyclist, was charged with making false declarations to a grand jury and obstruction of justice. Thomas testified before a grand jury in 2003 in connection with an investigation of Balco Industries, which allegedly manufactured performance enhancing drugs and laundered money. Balco employees eventually pled guilty to distributing the drugs. Thomas testified regarding her knowledge of Balco and its employees, subject to an immunity agreement. The government then charged her with committing perjury before the grand jury, specifically by denying that she had ever used drugs from Balco or any other anabolic steroid.

The brief does not support Plaintiff's position, for two reasons. First, the fact that government investigators were not specifically targeting Plaintiff does not mean that Defendant's answers to their inquiries about Plaintiff's drug use were not related to a government investigation of some other person or entity. Second, while the brief indicates that the

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[3] Because the brief was not made available to the public until after Plaintiff filed his Motion for Reconsideration, the Court will grant Plaintiff's Motion to Supplement.

government does not prosecute athletes solely for using steroids, it acknowledges that the government does investigate athletes for the possible distribution of steroids, and, as the *Thomas* case indicates, athletes who lie about steroid use under oath.

Plaintiff does cite, for the first time in his Motion for Reconsideration, one authority that gives the Court pause. In *Alaniz v. Hoyt*, the Texas Court of Appeals held that a math professor who had made allegedly defamatory statements regarding a university's chief financial officer had qualified immunity from suit because the plaintiff was a public official and the defendant's statements were made to those with a common or business interest in their contents. 105 S.W.3d 330 (Tex. App.—Corpus Christi 2003) *overruled on other grounds by Fort Brown Villas III Condominium Assoc., Inc. v. Gillenwater*, --- S.W.3d ---, 2009 WL 1028047 (Tex. Apr. 17, 2009). The Court of Appeals found that the defendant later waived his immunity, however, by publicly repeating his statements to third parties.

While the Court considers Defendant's statements to the Mitchell Commission to be protected, because they were made at the behest of federal prosecutors, it is possible that his later statements to SI.com were not made under similarly coercive circumstances. In order to evaluate whether Defendant waived his immunity by repeating his statements to SI.com, the Court would have to evaluate whether Defendant's statements to SI.com constituted "a significant part" of his protected statements to Mitchell and the factual circumstances relating to these statements. *See Alaniz*, 105 S.W.3d at 343 (citing *Terrell State Hosp. of the Tex. Dept. of Mental Health and Mental*

Retardation v. Ashworth, 794 S.W.2d 937, 940 (Tex. App.—Dallas 1990, mand. motion overr.)). Because the Court has already determined that it does not have jurisdiction over Defendant with respect to either his statements to Mitchell or SI.com, and because Plaintiff did not advance this argument in the original briefing, the Court will not undertake such an inquiry.

C. Slander Per Se

Plaintiff's final argument is that the Court erred by finding that Defendant's statements to Pettitte did not constitute slander per se. While the Court did find that Plaintiff satisfied the threshold inquiry of whether Defendant's statements were defamatory, it found that these statements did not constitute slander per se.

The standard for determining if a statement is slander per se is stricter than that used to determine if it is reasonably capable of defamatory meaning. To assess a statement's defamatory meaning, courts are required to consider the defamatory statement "as a whole, in light of surrounding circumstances, based upon how a person of ordinary intelligence would perceive the entire statement." *Moore v. Waldrop*, 166 S.W.3d 380, 385 (Tex. App.—Waco 2005, no pet.) (citing *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 154 (Tex. 2004)). Similarly, when determining if a statement should be considered slander per se, the initial inquiry is "what construction would be placed upon such language by the average reasonable person or the general public, not by the plaintiff." *Id.* at 386 (citing *Schauer v. Memorial Care Syst.*, 856 S.W.2d 437, 448 (Tex. App.—Houston [1st Dist.] 1993, no writ)). If the statement seen in this light has but one clear and obvious meaning, then the statement is

slander per se. *Id.* (citing *Gray v. HEB Food Store No. 4*, 941 S.W.2d 327, 329 (Tex. App.—Corp. Christi 1997, writ denied)). However, for the purposes of determining if a statement is slander per se, if the statement is ambiguous, or if the full effect of the statement cannot be understood without extrinsic evidence, then the trial court must consider the explanatory circumstances. *Id.* at 386 (citing *Montgomery Ward & Co. v. Peaster*, 178 S.W.2d 302, 305 (Tex. Civ. App.—Eastland 1994, no writ)). Once the court considers extrinsic evidence and innuendo, the statement becomes slander *per quod*, because innuendo not only reflects the meaning of the statement but also "illuminates the amount of harm the plaintiff may have suffered." *Id.* at 386.

The Court does not believe that Defendant's statements to Pettitte have "one clear and obvious meaning" that Plaintiff was committing a crime. That is certainly one reasonable interpretation of the statements—which is why the Court found that they were capable of defamatory meaning. In order to arrive at the conclusion that the statement implicates Plaintiff in a criminal act, however, the Court has to consider the extrinsic evidence of Plaintiff's status as a professional baseball player. It is this consideration which makes the statements, at best, slander *per quod*.[4]

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[4] In Plaintiff's Motion for Reconsideration, he cites a number of cases in which courts in other states have found that statements regarding a party's drug use amounted to slander per se. In two of these cases, both decided under Pennsylvania law, the courts considered innuendo to determine that a statement was slander per se, which is not permitted under Texas law *See Klump v. Nazareth Area High Sch. Dist.*, 425 F.Supp.2d 622, 638 (E.D.Penn.

D. Pendent Jurisdiction

Plaintiff urges the Court to exercise its pendent jurisdiction over his claims related to Defendant's statements to Mitchell and SI.com because they arise from the same "common nucleus of operative facts" as his claims arising from Defendant's statements to Pettitte. The factual basis of the claims are quite distinct—Defendant made the statements to different audiences, at different times and in different contexts. Further, as explained in the Court's earlier order, the Fifth Circuit dictates that a plaintiff bringing multiple claims arising out of different forum contacts of the defendant must establish specific jurisdiction for each claim. *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 274 (5th Cir. 2006). Since Plaintiff was unable to establish specific jurisdiction for these claims, the Court will decline to exercise its pendent jurisdiction to hear them.

2006) and *Brinich v. Jencka*, 757 A.2d 397, 397 (Pa. Super. Ct. 2000). The statements at issue in *Larson v. Decatur Memorial Hosp.* implicated illegal behavior—defendant informed a supervisor that the plaintiff was buying and selling "pot," which is illegal in Illinois. 602 N.E.2d 864 (Ill. App. Ct. 1992) Finally, in *Fourcade v. City of Gretna* and *Ultimate Creations, Inc. v. McMahon*, two cases in which the court used a standard similar to that in Texas, the statements at issue indicated that the defendants not only used steroids, but did so illegally 598 So.2d 415, 421 (La. Ct App 1992); 515 F Supp.2d 1060, 1067 (D.Az. 2007) In *Fourcade*, the defendants said the plaintiff had "got thrown out for using steroids" and in *Ultimate*, the defendants said that the plaintiff had "violated a stringent drug policy." These statements are distinguishable from the instant case because they have one obvious meaning—not that the plaintiff was using steroids, but that his use was unauthorized.

III. CONCLUSION

For the reasons above, Plaintiff's Motion to Supplement Motion to Reconsideration is **GRANTED**; Plaintiff's Motion for Reconsideration is **DENIED.**

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this the 30th day of June, 2009.

/s/Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

TO ENSURE PROPER NOTICE, EACH PARTY WHO RECEIVES THIS ORDER SHALL FORWARD A COPY OF IT TO EVERY OTHER PARTY AND AFFECTED NON-PARTY EVEN THOUGH THEY MAY HAVE BEEN SENT ONE BY THE COURT.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:08-cv-00471

[Filed February 12, 2009]

WILLIAM ROGER CLEMENS,	)
	)
Plaintiff,	)
	)
v.	)
	)
BRIAN MCNAMEE,	)
	)
Defendant.	)
	)

MEMORANDUM AND ORDER

Before the Court is Defendant Brian McNamee's Motion to Dismiss. (Doc. No. 40.) After considering the parties' filings, all responses and replies thereto, and the applicable law, the Court finds that the Motion should be granted in part and denied in part.

I. BACKGROUND

A. Plaintiff's Baseball Career

Plaintiff William Roger Clemens moved to Houston, Texas, from Ohio in 1977, at the age of fifteen. (Pl. Am. Compl. ¶ 11.) Clemens played baseball at Spring Woods High School, located in the Houston suburbs. (*Id.*) After high school, he played baseball for San Jacinto Junior College and the University of Texas. (*Id.* at ¶ 12.)

In 1983, Clemens was drafted by the Boston Red Sox. (*Id.* at ¶ 13.) He played for the Red Sox until 1996, when he signed with the Toronto Blue Jays. (*Id.* at ¶ 15.) It was while playing for the Blue Jays that Clemens first met McNamee, who worked as a trainer for the Toronto organization. (*Id.* at ¶ 16.)

In 1999, Clemens joined the New York Yankees. (*Id.* at ¶ 18.) One year later, the Yankees hired McNamee as an assistant trainer. (*Id.*) Clemens trained with McNamee through the 2001 season; afterwards, Clemens stopped working with McNamee when he learned that McNamee was facing rape allegations in Florida. (*Id.* at ¶¶ 21-22.) Eventually, sometime after 2001, Clemens chose to rehire McNamee, and they continued to train together until 2007. (*Id.* at ¶ 22.) During that time, McNamee routinely came to Houston to train Clemens and other professional athletes. (*Id.* at ¶ 22.)

Clemens retired from the Yankees in 2003. (*Id.* at ¶ 25.) In 2004, he joined the Houston Astros. (*Id.* at ¶¶ 26-27.) Clemens played for the Astros for three seasons, during which time he led the team to its first

World Series appearance. (*Id.* ¶ 26.) In 2007, he signed a one-year contract with the Yankees. (*Id.* at ¶ 27.)

Clemens has since announced his intention to join the Houston Astros for his post-playing career. (*Id.*) Throughout his major league career, Clemens temporarily resided in other cities, but he returned to Texas at the end of each baseball season, where he lives with his wife and four sons. (*Id.* at ¶ 24.) His extended family resides in Texas, and his mother lived in the state until her death. (*Id.*) Clemens has never owned any real property in New York, and he has no office or business operations there. (*Id.*)

B. McNamee's Alleged Defamatory Statements

Sometime in 1999 or 2000, McNamee told Andy Pettitte, Clemens's friend and fellow professional baseball player, that Clemens used human growth hormone ("HGH"). (*Id.* at ¶ 36.) This conversation occurred in Clemens's home gym in Houston, Texas. (*Id.*) Later, in 2003 or 2004, McNamee informed Pettitte at Pettitte's home gym in Deer Park, Texas, that Clemens had used steroids. (*Id.*)

According to Clemens's Amended Complaint, federal authorities first contacted McNamee about illegal steroid use in the summer of 2007. (*Id.* at ¶ 28.) They asked McNamee to meet with them in New York City. During this interview, the authorities told McNamee that the government had strong evidence that he was delivering packages of controlled substances, and that their evidence was sufficient to secure a conviction with a considerable prison term. (*Id.*) On the first day of interrogation, McNamee

denied that Clemens had ever used steroids or HGH. (*Id.*) On the second day of interrogation, however, McNamee informed federal investigators that he had injected Clemens with steroids in 1998, 2000, 2001, and with HGH in 2000. McNamee told the investigators that these injections occurred in New York. (Doc. No. 40, Ex. 1 at ¶ 2.) McNamee alleges that he never injected Clemens with steroids or HGH in Texas. (*Id.*)

Some time later, federal authorities contacted McNamee again. (Pl. Am. Compl. at ¶ 30.) They requested that McNamee repeat his story to former United States Senator George Mitchell; McNamee agreed and did speak with the Mitchell Commission. (*Id.* at ¶¶ 32-33.) Mitchell had begun an investigation into the use of performance enhancing substances in baseball at the request of Major League Baseball, a private business enterprise. (*Id.* at ¶ 31.) The Mitchell Commission's investigation was not associated with the governmental investigation into the use of performance enhancing substances among professional baseball players. (*Id.*)

On December 13, 2007, the Mitchell Commission released its *Report to the Commissioner of Baseball of an Independent Investigation Into the Illegal Use of Steroids and Other Performance Enhancing Substances By Players In Major League Baseball* ("Mitchell Report"). (*Id.* at ¶ 34.) The Mitchell Report contained McNamee's allegedly false statements regarding Clemens's steroid and HGH use. (*Id.*) Every major Texas newspaper extensively reported McNamee's allegedly false statements, and every national news service republished these statements, thereby disseminating them nationwide. (*Id.*)

Following the Mitchell Report's release, McNamee spoke with Jon Heyman, a senior writer for SI.com, on January 6, 2008. (*Id.* at ¶ 35.) During that interview, which took place at McNamee's home in New York, McNamee repeated his allegedly false statements regarding Clemens's steroid and HGH use. (*Id.*) Heyman posted an article containing these statements to SI.com on January 7, 2008. (*Id.*)

Clemens filed suit against McNamee on January 16, 2008 in the 129th District Court of Harris County, Texas. McNamee removed to this Court and later moved to dismiss. (Doc. No. 20.) Clemens responded to the motion and simultaneously filed his First Amended Complaint. (Doc. No. 31.) McNamee again moved to dismiss. (Doc. No. 40.)

II. PERSONAL JURISDICTION

McNamee argues that this Court cannot exercise personal jurisdiction over him for the statements he allegedly made to Mitchell and Heyman, because these statements occurred in New York.[1] For the reasons discussed below, the Court finds this argument persuasive.

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[1] McNamee also purports to challenge the Court's personal jurisdiction over him with respect to his alleged statements to Pettitte. Because the Court finds McNamee's arguments with respect to Pettitte to be more in the nature of a 12(b)(6) challenge, rather than an attack on the Court's jurisdiction, these arguments are discussed in a later section.

A. Legal Standards

A court may exercise personal jurisdiction over a nonresident defendant in a diversity suit only to the extent permitted by the laws of Texas and considerations of constitutional due process. *Command-Aire Corp. v. Ontario Mechanical Sales and Service Inc.*, 963 F.2d 90, 93 (5th Cir. 1992). Because the Texas long-arm statute, TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-17.045, is coterminous with the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, the court's constitutional due process inquiry into personal jurisdiction also serves as an inquiry into personal jurisdiction under the Texas long-arm statute. *Command-Aire Corp.*, 963 F.3d. at 93-94.

To comport with constitutional due process, Clemens must show: (1) McNamee purposefully availed himself of the benefits and protections of Texas law, thereby establishing "minimum contacts" with Texas such that McNamee could reasonably have anticipated being haled into court there; and (2) under the circumstances, the exercise of personal jurisdiction "does not offend traditional notions of fair play and substantial justice." *Id.* at 94 (*citing Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *and Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784 (5th Cir. 1990)); *Stuart v. Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985) ("When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident."). The minimum contacts requirement can be met through contacts sufficient to confer either

specific or general jurisdiction. *Cent. Freight Lines, Inc. v. APA Transp. Corp.*, 322 F.3d 376, 381 (5th Cir. 2003). Specific jurisdiction exists "[w]hen a nonresident defendant has purposefully directed its activities at the forum state and the litigation results from alleged injuries that arise out of or relate to those activities." *Id.* (quotations omitted). General jurisdiction can be exercised when a defendant's contacts with the forum state are substantial, continuous, and systematic, though unrelated to the litigation. *Id.*

Because Clemens argues that the Court has specific, as opposed to general, personal jurisdiction, Clemens's cause of action must arise from or relate to McNamee's contacts with the forum state. *See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8 (1984); *accord Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 584-85 (Tex. 2007) (citing *Rush v. Savchuk*, 444 U.S. 320, 329 (1980)) (requiring a "substantial connection" between the defendant's contacts and the facts of the litigation). Notably, the number of McNamee's contacts with Texas is not determinative of the personal jurisdiction analysis; "[e]ven a single, substantial act directed toward the forum can support specific jurisdiction." *Dalton v. R&W Marine, Inc.*, 897 F.2d 1359, 1361 (5th Cir. 1990) (*citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 n. 18 (1985)); *see also Ham v. La Cienega Music Co.*, 4 F.3d 413, 415-16 (5th Cir. 1993) ("Purposeful forum-directed activity—even if only a single substantial act—may permit the exercise of specific jurisdiction in an action arising from or related to such acts.").

While the party seeking to invoke the power of the court bears the burden of proving that jurisdiction exists, a *prima facie* showing suffices, and Clemens need not establish jurisdiction by a preponderance of the evidence. *Love N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006). Moreover, for purposes of this Order, the Court must view all facts contested in the affidavits in favor of jurisdiction. *Id.*; *Wyatt v. Kaplan* 686 F.2d 276, 280 (5th Cir. 1982). A plaintiff bringing multiple claims that arise out of different forum contacts of the defendant must establish specific jurisdiction for each claim. *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 274 (5th Cir. 2006). Clemens must therefore establish McNamee's minimum contacts with Texas for each allegation of defamation.

B. McNamee's Statements to Mitchell and Heyman

Despite the fact that McNamee allegedly made his statements to Mitchell and Heyman in New York, Clemens, citing *Calder v. Jones*, 465 U.S. 783 (1984), urges the Court to apply the "effects test" to assert jurisdiction. In *Calder*, the *National Enquirer* published an allegedly libelous story about movie star Shirley Jones. Jones filed suit in California against the writer of the story and his editor, who both lived in Florida. Neither had significant ties to California: the writer of the story had been there several times on business, and he had called sources in California when researching the story about Jones. The editor of the story had even less involvement with the state: he had been there twice, once for pleasure and once for business unrelated to the story at issue. Nevertheless,

the Supreme Court held that the California courts could properly assert jurisdiction over the two men:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms of both respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and the harm suffered.

Id. at 788-789. The Court noted that the defendants knew the brunt of the injury from the story would be felt by Jones in the state in which she lived and worked. *Id.* at 789-790.

McNamee argues that his statements were not sufficiently directed at Texas to warrant this Court's jurisdiction. To support his position, McNamee cites two recent Fifth Circuit cases applying *Calder*. In the first case, *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002), the plaintiff, a former FBI official who lived in Texas, sued a professor who published on the Internet an allegedly libelous article regarding the official's activities at the FBI. The article contained no reference to Texas or the official's Texas activities, and it was not specifically directed at Texas readers. The defendant, who had never been to Texas, did not even know that the plaintiff lived there.

On the basis of these facts, the Fifth Circuit found that this was not a sufficient relationship to warrant

jurisdiction over the defendant, observing that, "[the] [p]laintiff's residence in the forum, and suffering of harm there, will not alone support jurisdiction . . . ." *Revell*, 317 F.3d at 475. The Fifth Circuit noted that the article at issue contained no reference to Texas, did not refer to the Texas activities of Revell, and it was not directed at Texas readers as distinguished from readers in other states. *Id.* at 473. Based on these facts, the Court of Appeals concluded that Texas was not the focal point of the article or the harm suffered. *Id.*

The second case on which McNamee relies is *Fielding v. Hubert Burda Media*, 415 F.3d 419 (5th Cir. 2005). In *Fielding*, the defendant's connections to Texas were at least as tenuous as those found in *Revell*. The plaintiffs were the Swiss Ambassador to Germany and his American wife, a former Mrs. Texas. The defendants were several newspapers who wrote allegedly libelous articles about the plaintiffs' social lives in Berlin. The plaintiffs sued the defendants in Texas, arguing that jurisdiction was warranted by the defendants' minuscule circulation in the state and the fact that the stories harmed their reputations among friends and family in Texas.

The Court of Appeals declined to extend *Calder*, noting that the plaintiffs had not proved that they ever resided in Texas during any time relevant to the suit. *Fielding*, 415 F.3d at 427. The Fifth Circuit reiterated that the plaintiff's occasional residence in Texas was not sufficient to show that the defendant had knowledge that the effects of the story would be felt there: a "more direct aim is required." *Id.* (citing *Revell*, 371 F.3d at 476). The clear focus of the article was on the parties' activities in Germany and

Switzerland. *Id.* at 426. The newspapers had interviewed Texas sources, but the Court of Appeals concluded that these "fleeting contacts led to no new substantial disclosures and supplied little more than biographical backdrop." *Id.* Any references to Texas were "merely collateral" to the focus of the article. *Id.* at 426-427. Additionally, the brunt of the harm plaintiffs suffered was experienced in Europe, not Texas. *Id.* at 427.

Unlike the defendants in *Revell* and *Fielding*, McNamee knew that Clemens would feel the brunt of the harm from his statements in Texas. By his own admission, McNamee traveled to Texas 24 to 31 times to train Clemens and other professional athletes; each visit lasted approximately five days. He knew that Clemens had strong personal and professional ties to the state. McNamee stayed with the Clemens family during many of his visits, and Clemens had told him that he was planning on opening a fitness center in Texas sometime in 2008 or 2009. (Doc. No. 48, Ex. B at 197.)

Clemens's jurisdictional argument ultimately fails, however, because the focal point of McNamee's publication was not Texas. According to his affidavit, McNamee told Mitchell, and later Heyman, that he injected Clemens with steroids and HGH in Clemens's New York apartment, during the time that Clemens was pitching for the Yankees.[2] As the Fifth Circuit held in *Revell*, "the sources relied upon and activities

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[2] In determining whether personal jurisdiction exists, the Court may consider affidavits and other recognized forms of discovery. *Jobe v. ATR Marketing, Inc.*, 87 F.3d 751, 753 (5th Cir. 1996)

described in an allegedly defamatory publication should in some way connect with the forum if *Calder* is to be invoked." 371 F.3d at 474. McNamee's statements to Mitchell and Heyman did not mention Texas, they were not drawn from Texas sources, and, if anything, they was just as likely to attract the interest of New York Yankees fans as that of Houston Astros fans. The geographic focus of McNamee's statements was undoubtedly New York. Clemens's claims regarding McNamee's statements to Mitchell and Heyman should therefore be dismissed without prejudice to Clemens filing in another forum.

IV. THE LEGAL ADEQUACY OF CLEMENS'S ALLEGATIONS

McNamee argues that Clemens has failed to state a claim for defamation, for four independent reasons. First, McNamee claims that his statements to the Mitchell Commission are privileged, and therefore cannot form the basis for a defamation action. Second, McNamee alleges that Clemens is time barred from recovering for McNamee's statements to Pettitte. Third, McNamee contends that Clemens's Amended Complaint does not provide him sufficient notice of the alleged defamatory statements. Finally, McNamee argues his alleged statements to Pettitte were not defamation as a matter of law, and that Clemens has failed to plead special damages.

A. Legal Standard

When considering a Rule 12(b)(6) motion to dismiss, a court must "accept the complaint's well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Johnson v. Johnson*,

385 F.3d 503, 529 (5th Cir. 2004). "To survive a Rule 12(b)(6) motion to dismiss, a complaint does not need detailed factual allegations, but must provide the plaintiff's grounds for entitlement to relief--including factual allegations that when assumed to be true raise a right to relief above the speculative level." *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing Bell *Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964-65 (2007)).

B. Statute of Limitations

McNamee appears to concede that this Court has jurisdiction over Clemens's claims regarding McNamee's statements to Pettitte because they were allegedly made in Texas. McNamee argues, however, that these claims should be dismissed because they are barred by the statute of limitations. In Texas, a plaintiff must bring an action for malicious libel or slander no later than one year after the day the cause of action Accrues. TEX. CIV. PRAC. & REM. CODE ANN. § 16.002(a). In defamation cases, the cause of action accrues on the date the allegedly defamatory statement is published. *Wheeler v. Methodist Hospital*, 95 S.W.3d 628, 637 (Tex. App.--Houston 2002, no pet.). Clemens alleges that McNamee made the defamatory statements to Pettitte sometime in 1999-2000, and again in 2003-2004. At the very latest, then, the statute of limitations for these two defamatory acts would have run in 2001 and 2005, respectively. As Clemens did not file the present action until 2007, his claims are untimely.

In his defense, Clemens pleads the discovery rule. Under the rule, accrual of the cause of action is deferred until a plaintiff discovers, or, through the

exercise of reasonable care and diligence, should have discovered the nature of the injury. *Id.* (citing *Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998)). The discovery rule applies when the nature of the injury incurred is inherently undiscoverable and the evidence of the injury is objectively verifiable. *Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997) (quotations omitted). The rule is invoked only if the matter is not public knowledge. *Wheeler*, 95 S.W.3d at 637. In a trial on the merits, the party seeking the benefit of the discovery rule to avoid limitations has the burden of pleading and proving the discovery rule. *See Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 n. 3 (Tex. 1999).

The parties agree that McNamee's publication to Pettitte was not a public event; there is no suggestion that any third party was present at the time these statements were made. McNamee argues, rather, that based on conversations Clemens had with Pettitte in 2005, or conversations he allegedly overheard between Pettitte and McNamee, which occurred sometime before 2007, Clemens should have reasonably known that McNamee told Pettitte that Clemens was using steroids and HGH. In support of this argument, McNamee cites his own congressional testimony, and that of Pettitte. Clemens has properly pled that he did not know that McNamee had accused him of using steroids or HGH until the Mitchell Report was published on December 13, 2007 (Pl. Am. Compl. ¶¶ 44 and 52), and that he did not learn of McNamee's statements to Pettitte until sometime in 2008. (*Id.* at ¶ 36.) Furthermore, Clemens has presented extrinsic evidence in which he directly controverts McNamee and Pettitte's accounts of the 2005 conversations. (Doc. No. 40, Ex. 12 at 42-43.)

Since both sides have presented extrinsic evidence to support their position, the Court will exercise its discretion, pursuant to FED. R. CIV. P. 12(d)(2), to convert McNamee's pleading from a Rule 12(b)(6) motion to a Rule 56 motion.[3] A motion for summary judgment under Rule 56 requires the Court to determine whether the moving party is entitled to judgment as a matter of law based on the evidence thus far presented. FED. R. CIV. P. 56(c). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kee v. City of Rowlett*, 247 F.3d 206, 210 (5th Cir. 2001) (quotations omitted). A genuine issue of material fact exists if a reasonable jury could enter a verdict for the non-moving party. *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000). The Court views all evidence in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor.

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[3] Rule 12(d) reads: "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Since both sides submitted extrinsic evidence to the Court on the discovery rule issue, the parties were on notice that the Court might exercise its discretion to apply Rule 56. *Isquith v Middle South Utilities*, 847 F.2d 186, 194 n. 3 (5th Cir. 1988).

Whether Clemens learned of McNamee's statements to Pettitte in 2005, or sometime later, is material to the Court's application of the discovery rule. McNamee testified before Congress that, at one point, when he was training both Pettitte and Clemens, Pettitte turned to McNamee and said, within earshot of Clemens, "why didn't you tell me about this stuff?" (Doc. No. 40, Ex. 5 at 28-31.) McNamee then explained to Pettitte why he should not use HGH. (*Id.*) McNamee now claims that this conversation should have put Clemens on notice that McNamee had previously told Pettitte that Clemens used HGH.

Pettitte recounts a conversation that he had with Clemens in 2005, during which he asked Clemens what he would do if a reporter asked him about performance enhancing drugs. (Doc. No. 40, Ex. 2 ¶¶ 4-6.) Pettitte pointed out that Clemens had once told him that he used performance enhancing drugs. (*Id.*) Clemens told Pettitte that he must have misunderstood, because it was Clemens's wife Debbie who had used HGH. (*Id.* at ¶ 5.) McNamee claims that this conversation also should have put Clemens on notice that McNamee told Pettitte about his steroid use, because no one but McNamee knew that Clemens used steroids.

The Court cannot conclude, as a matter of law, that either of these conversations would have put Clemens on notice that McNamee had spoken to Pettitte about Clemens's steroid or HGH use. Even assuming that Clemens did not dispute the conversations, a reasonable jury could find that, in the first conversation, Clemens merely overheard McNamee telling Pettitte why he should not use HGH. As to the second conversation, a jury could conclude that

Clemens believed that Pettitte really had misunderstood their previous conversation about Debbie Clemens's HGH use.

Additionally, McNamee argues that, because he voiced concerns about Clemens's steroid use to Clemens's agent, Jim Murray in 2003, Clemens should have been on notice that McNamee had also spoken to Pettitte. Clemens claims that he did not learn about this conversation until sometime after it happened. (Doc. No. 48, Ex. CC at 120.) A reasonable jury could easily conclude that this statement would not put Clemens on notice that McNamee was discussing his steroid use with other players, such as Pettitte. Finally, McNamee argues that, because Pettitte and Clemens discussed steroid use after the Grimsley report was released in 2006, Clemens should have been on notice that McNamee told Pettitte that Clemens used performance enhancing drugs. The record merely indicates that the two men discussed the report, however, and that Pettitte asked Clemens what he was going to tell reporters. Clemens responded that he would tell reporters the truth. (*Id.* at 175.) Clemens claims that he knew Pettitte was upset that day, but that he did not know why. (*Id.* at 172.) Viewing the facts in the light most favorable to Clemens, a reasonable jury could find that, if he had not actually used steroids, he would have no reason to believe that Pettitte suspected his use, and no reason to believe that McNamee was the source of Pettitte's suspicions. Because many of the above facts are disputed, and because a reasonable jury could interpret the facts in a variety of ways, based on the witnesses' credibility, the Court holds that summary judgment as to the discovery rule should be denied.

C. Immunity for Statements Made During a Judicial Proceeding

McNamee argues that his statements to the Mitchell Commission are privileged, and therefore cannot form the basis for a defamation action[4] The Court has already determined that it does not have personal jurisdiction over McNamee with respect to his statements to Mitchell. In the alternative, the Court now finds that McNamee's statements to Mitchell should be treated with immunity.

Based on statements made by McNamee's counsel at oral argument, the Court requested that McNamee submit additional evidence of a judicial proceeding, including statements from the prosecutors and investigators involved, any judicial records, and evidence that McNamee's statements were not voluntary. (Doc. No. 59.) In response, McNamee submitted three declarations, including two declarations from his own counsel and one from Assistant United States Attorney Matthew A. Parrella.

Since the material submitted by McNamee is "comprehensive and will enable a rational determination of summary judgment," the Court will again evaluate this part of McNamee's argument under Rule 56. *Isquith*, 847 F.2d at 194 n. 3 (citing 5 C. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366 (1969)). The Court requested additional

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[4] The Court notes that McNamee's immunity argument is intended to extend only to his statements to the Mitchell Commission, and that he appears to recognize that this argument would not reach his alleged statements to Pettitte or Heyman.

material from McNamee in a written order, giving the parties sufficient notice that it might consider this argument under Rule 56. *See Isquith*, 847 F.2d at 196. Clemens has not submitted any evidence controverting the contents of the Declarations.

Under Texas law, statements made to government agencies as part of legislative, judicial, or quasi-judicial proceedings are entitled to absolute immunity so long as they are made as part of an ongoing proceeding, they are not unsolicited, and they are made to an agency whose findings need not be approved or ratified by another agency. *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 994 (5th Cir. 1999) (*citing Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1987), *Zarate v. Cortinas*, 553 S.W.2d 652, 655 (Tex.Civ.App.—Corpus Christi 1977, no writ), *Thomas v. Bracey*, 940 S.W.2d 340, 343 (Tex.App.—San Antonio 1997, no writ), *and Parker v. Holbrook*, 647 S.W.2d 692, 695 (Tex.App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.)). It is McNamee's contention that his allegedly defamatory statements stemmed from his cooperation with federal officials when he was under threat of federal prosecution.

In *Shanks v. Allied Signal Inc.*, the Fifth Circuit considered whether such immunity should be given to statements made during the context of a National Transportation Safety Board investigation. After reviewing Texas law, the Fifth Circuit determined that, even though the Texas Supreme Court had never spoken to the specific issue of whether statements made to NTSB investigators were protected by absolute immunity, the Court would most likely find these statements to be covered. In coming to this conclusion, the Fifth Circuit recognized that, when

communications relate to an ongoing proceeding, absolute immunity applies. It thus held that, under Texas law, statements made to NTSB investigators were subject to absolute immunity.

According to Assistant United States Attorney Parrella, he interviewed McNamee as part of an investigation into the distribution of anabolic steroids, human growth hormones, and money laundering. (Parrella Decl., Dec. 17, 2008, ¶ 1.) McNamee and his counsel met with Parrella, FBI agents, and IRS agents numerous times. (*Id.* at ¶ 2.) McNamee was told, prior to the interviews, that he was not a target of the investigation, but that his "witness status would be subject to review if he chose not to co-operate." (*Id.* at ¶ 3.) McNamee's statements during the interview were given use immunity, and he was told that he was subject to prosecution for making false statements. (*Id.*)

It was Parrella who requested that McNamee speak to the Mitchell Commission. Parrella told McNamee that speaking to the Mitchell Commission was part of his co-operation with the investigation in order to maintain his witness status. (*Id.* at ¶ 4.) Prior to the interviews with the Mitchell Commission, Parrella told McNamee that the proffer agreement would cover the interviews and that he could face prosecution for any false material statements. (*Id.*) McNamee agreed to these terms, and he participated in three interviews with the Mitchell Commission. (*Id.*) The interviews were all arranged by either agents or Assistant United States Attorneys. Agents and Assistant United States Attorneys participated, either in person or via phone, in all interviews between McNamee and the Mitchell Commission. (*Id.*)

Parrella's investigation, much like the NTSB investigation at issue in *Shanks*, was an ongoing proceeding. *Shanks*, 169 F.3d at 994. All of McNamee's interviews with Mitchell were scheduled by prosecutors or federal agents. Parrella compelled McNamee to speak to Mitchell, in effect, by warning him that, if he did not cooperate, his witness status could change. Parrella also warned McNamee that, if he lied to Mitchell, he could be subject to a federal prosecution. As a matter of public policy, McNamee's statements to Mitchell should be protected. As the court observed in *Darrah v. Hinds*, "the proper administration of justice requires full disclosure from witnesses without fear of retaliatory lawsuits for defamation of any sort." 720 S.W.2d 689, 691 (Tex. App.—Fort Worth 1986, ref. n.r.e.) (citing *James v. Brown*, 637 S.W.2d 914, 917 (Tex. 1982)).

Finally, Clemens argues that the privilege only entitles McNamee to a defense, and not immunity from suit. In support of his position, he cites *In re Lee*, 995 S.W.2d 774 (Tex. App.— San Antonio 1999, no pet.). In *Lee*, the Texas Court of Appeals held that the "history and use of the privilege indicate that its intended purpose is to provide merely a defense to defamation claims, not an absolute immunity from those claims." *Id.* at 776. While the Court believes that this language in *Lee* is a departure from the Texas Supreme Court's holding in *Thomas v. Bracey*, in which it said that "communications made in the course of a judicial proceeding *may not serve as the basis of a civil action for libel or slander*, regardless of the negligence or malice with which they are made," 940 S.W.2d at 342-343 (emphasis added), the result in the instant case is the same if the Court treats McNamee's argument as an affirmative defense rather than

grounds for absolute immunity. Since Clemens does not dispute Parrella's Declaration, the Court finds, pursuant to Rule 56, that McNamee was compelled to make his statements to Mitchell as part of a judicial proceeding.

D. Specificity of Clemens's Defamation Claims

McNamee next argues that Clemens's defamation claims fail because the alleged defamatory statements are not described with enough specificity in Clemens's Amended Complaint. In support of this argument, McNamee cites *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 699 (8th Cir. 1979), an Eighth Circuit case requiring defamation plaintiffs to include the exact language of the defamatory statement in their pleadings. McNamee contends that Clemens has failed to satisfy this requirement because his Amended Complaint does not cite the exact portions of the Mitchell Report, or McNamee's exact statements to Heyman and Pettitte, which Clemens believes are slanderous. McNamee also asserts that Clemens's claims regarding his alleged statements to Pettitte are deficient because Clemens fails to specify during which year these statements occurred.

With respect to McNamee's statements to Mitchell and Heyman, this argument is moot, since the Court has determined that it does not have personal jurisdiction over McNamee with respect to these claims. As to the claims regarding McNamee's statements to Pettitte, McNamee himself did not recall the exact dates of the conversation; there is no way that Clemens could possibly identify the specific year the conversations took place. Nevertheless, the Court

will require Clemens to amend his Complaint to provide the exact statements McNamee made to Pettitte that Clemens considers defamatory, as well as more detail about the context of each conversation.

E. Defamation As A Matter of Law

McNamee argues that his alleged statements to Pettitte are not defamatory as a matter of law. First, McNamee argues that Clemens's Amended Complaint does not allege that he told Pettitte that Clemens was using the steroids illegally, or for non-medical purposes. Second, he contends that the Amended Complaint does not, on its face, allege McNamee told Pettitte that Clemens was knowingly using steroids. Instead, McNamee argues that a reasonable person could infer, based on the Amended Complaint, that Clemens was not aware of the injections' contents. McNamee next argues that it was Pettitte who told him in 1999 or 2000 that Clemens had used HGH. Finally, McNamee contends that his statements made to Pettitte during 2003 or 2004 regarding Clemens's illegal steroid use were not defamation as a matter of law because Pettitte "paid these statements no mind" and because Pettitte himself was already using performance enhancing drugs at this time.

A statement is defamatory if it exposes a person to "public hatred, contempt or ridicule, or financial injury or [if it] impeach[es] any person's honesty, integrity, virtue, or reputation." *Double Diamond, Inc. v. Van Tyne*, 109 S.W.3d 848, 854 (Tex. App.—Dallas 2003, no pet.) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 73.001). Publication of defamatory words means to communicate the words, either orally, in writing, or in print, to a third person capable of understanding their

defamatory import and in such a way that the third person would understand. *Id.* Whether a publication is capable of the defamatory meaning alleged by the plaintiff is a question of law to be determined by the court. *Id.* (citing *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000)). When a publication is of ambiguous or doubtful import, however, the jury must determine its meaning. The threshold question is therefore whether the complained of statements are reasonably capable of a defamatory meaning. *Id.* The allegedly defamatory statement "must be construed as a whole, in light of surrounding circumstances, based upon how a person of ordinary intelligence would perceive the entire statement." *Moore v. Waldrop*, 166 S.W.3d 380, 385 (Tex. App.—Waco 2005, no pet.) (citing *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 154 (Tex. 2004)).

The Court finds that McNamee's statements to Pettitte are reasonably capable of defamatory meaning. Given that Clemens was a professional baseball player in peak physical condition, it is likely that Pettitte understood that Clemens was using HGH or steroids without a prescription from a medical doctor. A jury could also find, based on McNamee's status as Clemens's employee, that Clemens knew of and could control the injections' contents. Finally, Pettitte's own use of steroids does not reduce the defamatory content of McNamee's statements. The statements were still capable of damaging Pettitte's opinion of Clemens's honesty and integrity, and his pitching ability, regardless of Pettitte's own shortcomings.

McNamee argues that, even if Clemens has successfully presented a defamation claim, he has

failed to plead a claim for defamation *per se*, and he is therefore required to plead special damages. In Texas, there are two classifications of slander. A statement is slander *per se* if it imputes the commission of a crime; (2) imputes the contraction of a loathsome disease; (3) would cause injury to a person's office, business, profession, or calling; or (4) imputes sexual misconduct. *Id* at 384. To determine whether a statement is slander per se, "the test is what construction would be placed upon such language by the average reasonable person or the general public, not by the plaintiff." *Id.* at 386 (citing *Schauer v. Memorial Care Syst.*, 856 S.W.2d 437, 448 (Tex. App.—Houston [1st. Dist.] 1993, no writ)). If the statement seen in this light has but one clear and obvious meaning, then no further inquiry is necessary. *Id.* (citing *Gray v. HEB Food Store No. 4*, 941 S.W.2d 327, 329 (Tex. App.—Corp. Christi 1997, writ denied)). If the statement is slander *per se*, no independent proof of damage to the plaintiff's reputation or of mental anguish is required, as the slander itself gives rise to a presumption of these damages. *Id.*

If the statement is ambiguous, or if the full effect of the statement cannot be understood without extrinsic evidence, then the trial court must consider the explanatory circumstances. *Id.* at 386 (citing *Montgomery Ward & Co. v. Peaster*, 178 S.W.2d 302, 305 (Tex. Civ. App.—Eastland 1994, no writ). Once the court considers extrinsic evidence and innuendo, the statement becomes slander *per quod*, because innuendo not only reflects the meaning of the statement but also "illuminates the amount of harm the plaintiff may have suffered." *Id.* at 386. If a statement is slander *per quod*, the plaintiff must present proof of actual damages. In other words, "the

plaintiff must prove that those to whom the statement was published understood the meaning that the plaintiff attaches to the statement." *Id.*

Clemens claims that he has pleaded slander *per se*, because McNamee's statements to Pettitte imply that he engaged in illegal activity and would cause injury to his profession. Given that McNamee did not specifically tell Pettitte that Clemens was using the steroids knowingly and without a prescription, McNamee statements to Pettitte do not rise to the level of slander *per se*. The Court will allow Clemens to amend his Complaint to include special damages.

III. VENUE

McNamee's final argument is that the case should be transferred to either the Southern or Eastern District of New York, pursuant to 28 U.S.C. § 1404(a). Under § 1404(a), a correctly filed case may be transferred to another proper venue "[f]or the convenience of parties and witnesses, in the interest of justice." The case was removed, and nothing in § 1441, the statute governing removal, restricts the authority of the district court to transfer or dismiss the action on the grounds of inconvenient forum. 28 U.S.C. § 1441(e)(6). Venue of a removed action is governed by 28 U.S.C. § 1441. That statute reads, "[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). Accordingly, venue is proper in the Houston Division of the United States District Court for the Southern District of Texas,

which is the district and division embracing Harris County where the action was pending at the time of removal. In addition, the action could have been filed in either the Southern or Eastern District of New York. *See* 28 U.S.C. § 1391 (a).

McNamee, as the movant under Section 1404(a), bears the burden of establishing the propriety of the transfer. *In re: Volkswagen of America, Inc.*, 545 F.3d 304, 314 (5th Cir. 2008) (en banc). The movant must "show good cause." *Id.* (citing *Humble Oil & Ref. Co. v. Bell Marine Serv.*, 321 F.2d 53, 56 (5th Cir. 1963)). Good cause means that "a moving party, in order to support its claim for a transfer, must satisfy the statutory requirements and clearly demonstrate that a transfer is '[f]or the convenience of parties and witnesses, in the interest of justice.' Thus, when the transferee venue is not clearly more convenient than the venue chosen by the plaintiff, the plaintiff's choice should be respected." *Id.* at 315 (distinguishing the heavier burden under the *forum non conveniens* standard where the movant must show that the factors "substantially outweigh" the plaintiff's choice of venue). A plaintiff's choice of forum is given more deference when he has chosen his home forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981).

The Supreme Court set forth private and public factors to be weighed in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and reaffirmed them in *Piper*, 454 U.S. 235 (1981). The Fifth Circuit adopted the *forum non conveniens* factors for the § 1404(a) context. *Humble Oil*, 321 F.2d at 56; *In re Volkswagen*, 545 F.3d at 314 n. 9. The private interest factors are: "(1) the relative ease of access to sources of proof (2) the availability of compulsory process to secure the

attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *In re Volkswagen*, 545 F.3d at 314 (citing *Piper Aircraft*, 454 U.S. at 241 n. 6). The public interest factors are: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law." *Id.*

Given that the only remaining claims are based on McNamee's statements to Pettitte, which occurred in Texas, the Court does not believe it would be in the interest of justice to transfer venue. The private factors weigh against such a transfer. Pettitte, who will be the central witness, lives in the Houston area and is subject to the subpoena power of this Court. The cost and burden of travel imposed on Pettitte will be minimal. The public interest factors also weigh against a transfer. Since the alleged defamatory act occurred in Texas and will be adjudicated under Texas law, Texas has a strong interest in having the trial occur in Houston. Based on the remaining claims, the Court does not see a compelling reason to upset Clemens's choice of venue.

III. CONCLUSION

The Court is fully aware that the result reached is a counter-intuitive one, creating the potential for related proceedings pending in jurisdictions many miles apart. This is, however, a result mandated by well-established precedents that the Court is not at

liberty to ignore or distort. McNamee's Motion to Dismiss is therefore **GRANTED IN PART** as to the claims based on McNamee's alleged statements to Mitchell and Heyman. The Motion is **DENIED IN PART** with respect to McNamee's alleged statements to Pettitte. Clemens is granted leave to amend his Complaint, within thirty days, to include McNamee's specific statements to Pettitte which Clemens considers defamatory, as well as more details about the context of those statements. Clemens is also given leave to amend his Complaint to include special damages.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this the 12th day of February, 2009.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

TO ENSURE PROPER NOTICE, EACH PARTY WHO RECEIVES THIS ORDER SHALL FORWARD A COPY OF IT TO EVERY OTHER PARTY AND AFFECTED NON-PARTY EVEN THOUGH THEY MAY HAVE BEEN SENT ONE BY THE COURT.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-20625

[Filed October 27, 2010]

WILLIAM ROGER CLEMENS,	)
	)
Plaintiff - Appellant,	)
	)
v.	)
	)
BRIAN MCNAMEE,	)
	)
Defendant - Appellee.	)
	)

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 08/12/10, 5 Cir., ___, ___, F.3d ___)

Before DAVIS, SMITH, and HAYNES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 39, the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NO.: 4:08-CV-00471
JURY DEMANDED

[Filed May 27, 2008]

WILLIAM ROGER CLEMENS	)
	)
V.	)
	)
BRIAN McNAMEE	)
	)

PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE COURT:

Plaintiff William Roger Clemens ("Clemens") complains of Defendant Brian McNamee ("McNamee").

I.

PARTIES

1. Clemens is an individual who is a citizen of and resides in Harris County, Texas.

2. McNamee is an individual who is a citizen of and resides in New York. He has been served with process and appeared in this lawsuit.

II.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction because Clemens and McNamee are citizens of different states and the amount in controversy exceeds $75,000, exclusive of interest and costs. *See* 28 U.S.C. § 1332(a)(1).

4. This Court has personal jurisdiction over McNamee because the Texas long-arm statute establishes personal jurisdiction over McNamee and the exercise of personal jurisdiction over McNamee in Texas does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

5. The Texas long-arm statute authorizes personal jurisdiction over McNamee because McNamee has done business in Texas by contracting with Texas residents with the performance of the contracts to occur in whole or in part in Texas. Specifically, McNamee contracted with Clemens and Andy Pettitte, both Texas residents, to perform services in Texas as a strength and conditioning trainer. Between approximately 1999-2007, McNamee derived substantial income as payment for training Clemens and Pettitte in Texas. For example, in 2004 alone, Pettitte paid McNamee approximately $62,000--$64,000 to train him in Texas. McNamee traveled to Texas at least 30-38 times between 1999-2007 to

provide services as a strength and conditioning trainer to Clemens and Pettitte, each time staying approximately 5 days.

6. McNamee has also done business in Texas by committing the torts of defamation and intentional infliction of emotional distress in whole or in part in Texas. Specifically, while present in Texas to train Clemens and Pettitte, McNamee maliciously and intentionally defamed Clemens, a Texas resident, by falsely telling Pettitte, a Texas resident, that Clemens had used steroids and human growth hormone ("HGH"). Moreover, McNamee maliciously and intentionally defamed and inflicted emotional distress on Clemens in whole or in part in Texas by repeating his false accusations that Clemens had used steroids and HGH to the Mitchell Commission and SI.com, knowing that his false accusations would be republished and widely-circulated and read in Texas, thereby causing devastating injury to Clemens in Texas, where McNamee knew that Clemens lives, worked, and has significant business interests, which in fact has occurred.

7. The Due Process Clause authorizes personal jurisdiction over McNamee in Texas because he has purposefully availed himself of the benefits and protections of Texas by establishing "minimum contacts" with Texas such that the maintenance of this suit in Texas does not offend traditional notions of fair play and substantial justice.

8. This Court has specific jurisdiction over McNamee because Clemens's suit arises out of or results from McNamee's contacts with Texas. Specifically, while present in Texas to train Clemens

and Pettitte, McNamee intentionally and maliciously defamed Clemens, a Texas resident, by telling Pettitte, a Texas resident, that Clemens had used steroids and HGH.

9. Moreover, McNamee intentionally and maliciously defamed and inflicted emotional distress on Clemens in Texas by repeating his false accusations that Clemens had used steroids and HGH to the Mitchell Commission and SI.com, knowing that they would republish and widely-circulate them in Texas. Indeed, McNamee's false accusations have been circulated to—and read by—millions of Texas residents via the Internet and the numerous Texas newspapers that republished them. McNamee knew that the republication of his false accusations by the Mitchell Commission and SI.com in Texas would cause devastating injury to Clemens's reputation, mental state, and business interests there and, indeed, it has. McNamee knew that, by expressly aiming his intentionally tortious conduct at Clemens in Texas, he would cause Clemens to feel the brunt of his enormous emotional, reputational, and economic injury in Texas because, as McNamee knew, Clemens lives, worked, and has significant business interests in Texas. Specifically, McNamee knew that: Clemens has lived in Texas for many years; Clemens has long-term personal services contracts with Texas-based businesses; and Clemens runs a charitable foundation in Houston, Texas.

10. Venue is proper in the Southern District of Texas because McNamee removed this lawsuit from a Harris County, Texas district court to this Court, thereby fixing proper venue in this district. Venue is also proper in the Southern District of Texas is proper

because a substantial part of the events or omissions giving rise to Clemens's defamation claims occurred in this district. Specifically, while present in Texas to provide strength and conditioning trainer services to Clemens and Pettitte, McNamee defamed Clemens, a Texas resident, by telling Pettitte, a Texas resident, that Clemens had used steroids and HGH.

III.

FACTUAL BACKGROUND

11. Clemens was born in Dayton, Ohio in 1962. He was one of six children raised primarily by a single mother who worked several jobs to support her family. After spending his early childhood in Dayton, Clemens moved with his family to Houston in 1977, where he has lived ever since. During his high school days in Houston, Clemens became a stand-out athlete at Spring Woods High School, where he excelled in football, basketball, and especially baseball.

12. Though Clemens was drafted by the New York Mets upon graduation from high school, he opted to attend college. When The University of Texas failed to offer him a scholarship, however, he attended San Jacinto Junior College, where he played baseball. After a stellar freshman year on the baseball field, Clemens was offered a scholarship to The University of Texas. While at Texas, Clemens led the mighty Longhorns to a national title at the College World Series in 1983. Clemens became the first player to have his baseball uniform number retired at The University of Texas.

13. Clemens was drafted in the first round by the Boston Red Sox in 1983, and quickly rose through

the minor league system, making his major league debut on May 15, 1984. During his 13-year career with the Red Sox, Clemens had numerous record breaking seasons. In 1986, Clemens received the American League Most Valuable Player Award and the first of his seven Cy Young awards, all while helping the Red Sox reach the World Series. He made baseball history that same year by becoming the first pitcher to ever strike out 20 batters in a single, nine-inning game. After the game, Clemens's manager reportedly commented that "I watched perfect games by Catfish Hunter and Mike Witt, but this was the most awesome pitching performance I've ever seen." Clemens repeated that same accomplishment in 1996—becoming the only player to do so.

14. While playing for the Red Sox, Clemens won two more Cy Young awards (1987 and 1991). Since his departure in 1996, no other Red Sox player has worn Clemens's number "21."

15. When the Red Sox did not aggressively try to re-sign Clemens following the 1996 season, Clemens signed a multi-year contract with the Toronto Blue Jays (Red Sox general manager Dan Duquette famously stated, after Clemens signed with Toronto, that he wished Clemens well during the "twilight of his career"). Clemens finished the 1996 season with Boston brilliantly, and continued his dominating performance through the 1997 season with Toronto, during which he won his fourth Cy Young award and the pitching triple crown.

16. In 1998, Clemens met Brian McNamee for the first time. Clemens was in his second year with Toronto at the time, and McNamee had just been hired

by the Toronto organization as a trainer. McNamee was hired by Toronto after working several years with the New York Yankees organization as a bullpen catcher.

17. Clemens and McNamee soon discovered a shared intensity for grueling, military-style workouts. Clemens shared his own rigorous personal training regimen with McNamee, which McNamee helped modify. Though Clemens had experience with other personal trainers, McNamee impressed Clemens with his commitment to Clemens's disciplined work-outs.

18. Just as he had done prior to meeting McNamee, Clemens continued his pitching dominance in 1998, winning the Cy Young award for the fifth time and a second consecutive pitching triple crown. Clemens was traded to the New York Yankees in 1999, where he helped the Yankees secure back-to-back World Series titles in 1999 and 2000. In 2000, McNamee began to aggressively lobby Clemens for a job with the Yankees in order to be back in New York with his family. That same year, the Yankees hired McNamee as an assistant trainer and McNamee began working with the Yankee players, including Clemens.

19. Around this time, suspected steroid use by major league baseball players began drawing considerable attention. On October 1, 2000, *The New York Times* published an article by McNamee. The article, entitled "Don't be so Quick to Prejudge all that Power," was crafted by McNamee as a public rebuttal to a previous piece published by the same newspaper, which suggested improved player performance in major league baseball was attributable to steroid use. McNamee's unsolicited statements in the article he

wrote reached an international audience, and he told the world in his own words that imputing steroid use to all high-performing players in the league was "unsubstantiated and unfounded." McNamee also stated that the article's smear against "the improved performances of today's players is just wrong." In unambiguous terms, McNamee proclaimed that an alternative explanation for improved player performance included the fact that "[p]layers today are so much smarter when it comes to their bodies, how they work them, and what they put in them."

20. Clemens had yet another record-breaking performance in 2001. He was the first pitcher in the history of major league baseball to begin a season with a record of 20 wins and one loss. This was his sixth 20-win campaign over the course of 17 years. He also won the Cy Young award for the sixth time. Despite his record wins and additional Cy Young award, his individual statistics that year were consistent with his overall career performance.

21. After the 2001 season, Clemens stopped training with McNamee after he learned that McNamee was a suspect in a rape investigation in Florida (this same period of time marks what McNamee later contends is the last time he injected Clemens with steroids). The rape investigation in Florida, which reveals that McNamee lied to police officers and refused their requests for evidence in a situation where he denied any wrongdoing, ultimately led to his release from the Yankees organization, though no formal charges were brought against him. McNamee's termination from the Yankees and from Clemens left McNamee embittered.

22. After the incident in Florida, McNamee complained to Clemens that he could no longer make a living as a trainer. McNamee pleaded with Clemens for work, insisting that the alleged rape in Florida was actually a life-saving attempt and that he had "taken the rap" for others. McNamee's explanation was totally at odds with the conclusions of the police officers conducting the official investigation in St. Petersburg, Florida. Since this was unknown to Clemens, he gave McNamee the benefit of the doubt and eventually agreed to re-hire McNamee. Thereafter, McNamee continued to routinely come to Houston through the summer of 2007 to train Clemens. Also during this same period of time, McNamee frequently came to Texas to train other professional athletes. Significantly, McNamee has never contended that Clemens used steroids after 2001, despite their continued contact with one another.

23. Clemens continued to pitch for the Yankees for two more seasons. In 2003, Clemens again distinguished himself by becoming the 21st pitcher ever to win 300 games. He was also the 3rd pitcher ever to record 4,000 strike-outs. Consistent with his precedent-setting performances throughout his entire career, Clemens became the only pitcher in the history of major league baseball to record both of these record-setting feats during the same game.

24. While playing with the Red Sox, Blue Jays, and Yankees, Clemens temporarily resided in those cities during the baseball season. Despite his temporary residence in those cities, however, Clemens never intended to reside there permanently, but instead he returned to Texas at the end of each baseball season where he lived with his wife and four

sons. Texas is also home to Clemens's extended family. Clemens's mother lived in Texas until her death, and his five siblings and seven of his nephews and nieces still reside in Texas. Clemens has never owned any real property in New York and has no office or business operations there.

25. Clemens retired at the end of 2003, but reconsidered his decision and joined his home-town Houston Astros in 2004. Clemens's performance that year earned him an unprecedented seventh Cy Young award. He also climbed to second (behind Nolan Ryan, who retired at age 46) on the all time strike-out list and was named a starter to the National League All Star Team.

26. Clemens re-signed with the Astros in 2005 and continued his pitching dominance. His ERA that year was a remarkable 1.87—the lowest in the major leagues and the lowest in his 22-season career. Clemens also helped lead the Astros to their first World Series.

27. Clemens pitched one more season for the Astros, where he was again dominating as a pitcher, but because of low run support by the offense, won only seven games in an abbreviated season. Clemens signed a one-year contract with the Yankees for the 2007 season. The Yankees' pursuit of another World Series appearance ended in post-season play. Clemens has since announced his intention to join the Houston Astros for his post-playing career.

28. According to what McNamee has told others, he was first confronted by federal authorities in the summer of 2007. McNamee has stated that in June of

2007, he was contacted by federal law enforcement authorities and asked to attend an interview with them in New York City. According to McNamee, he was told that the government had strong evidence that he was delivering packages of controlled substances for Kirk Radomski and that their evidence was sufficient to secure a conviction that would send him to prison for a considerable period. Throughout a lengthy interrogation the first day, McNamee told others that he repeatedly denied that Clemens had used steroids or HGH.

29. However, McNamee has told others during his second day of interrogation that he recanted and told the federal investigators that he had injected Clemens with steroids in 1998, 2000, and 2001, and HGH in 2000.

30. According to what McNamee has told others, some time after this two day interrogation, he was again contacted by federal authorities. This time, they wanted McNamee to repeat his story to former United States Senator George Mitchell even though, according to Earl Ward, McNamee's lawyer, it was not required by his proffer agreement with federal authorities.

31. Mitchell, a private citizen without any governmental authority, with the assistance of DLA Piper US LLP, a private law firm without any governmental authority (collectively the "Mitchell Commission"), had begun an investigation into the use of performance enhancing substances in baseball at the request of Major League Baseball, a private business enterprise. The Mitchell Commission has described its investigation as "an independent inquiry on behalf of a private entity." The investigation

conducted by the Mitchell Commission was not a part of any governmental investigation into the use of performance enhancing substances in baseball. Indeed, Mitchell has expressly denied providing any information to governmental investigators and also denied that any governmental investigators used the Mitchell Commission's investigation to do their work for them.

32. McNamee has contended that when he initially refused to speak with Mitchell, he was told by the federal government that he would be moved from his "witness" status back to a "target" status and fully prosecuted. McNamee has stated that when faced again with the threat of federal prosecution, he agreed to speak with the Mitchell Commission. However, Ward, McNamee's lawyer, has stated that McNamee voluntarily spoke with the Mitchell Commission: "He had no problems speaking with Senator Mitchell." And Senator Mitchell has testified that McNamee requested to be interviewed by the Mitchell Commission.

33. McNamee appeared before the Mitchell Commission and intentionally and maliciously repeated to its members his false accusations that Clemens had used steroids and HGH. McNamee knew that the Mitchell Commission would republish his false accusations and that they would be widely-circulated and read in Texas. McNamee also knew that his false accusations would have a devastating impact on Clemens's reputation, mental state, and business interests in Texas where McNamee knew that Clemens lived, worked, and conducted the most business.

34. On December 13, 2007, the Mitchell Commission released its *Report to the Commissioner of Baseball of an Independent Investigation Into the Illegal Use of Steroids and Other Performance Enhancing Substances By Players In Major League Baseball* ("Mitchell Report"). The Mitchell Report republished to the world McNamee's false accusations that Clemens had used steroids and HGH. A link to the Mitchell Report was immediately placed on dozens of websites, including MLB.com, the official website for Major League Baseball, and thereby circulated to every Texas resident with Internet access (approximately 16,000,000 people). MLB.com was accessed by at least 19,000,000 visitors in December 2007. In addition, virtually every major Texas newspaper and many smaller ones extensively reported McNamee's false accusations that Clemens had used steroids and HGH. And every national news service republished McNamee's statements thereby disseminating his false accusations nationwide.

35. Since McNamee's comments in the Mitchell Report were released, McNamee has publicly repeated his false accusations that Clemens used steroids. Directly contrary to the assertion of McNamee's counsel, Richard Emery, who told the New York Daily News on March 4, 2008 that McNamee "did not speak to the press," McNamee in fact spoke to Jon Heyman, a senior writer with SI.com on January 6, 2008. Specifically, on January 6, 2008, McNamee invited Heyman, his friend, into his home and gave him an exclusive interview. During that interview, McNamee intentionally and maliciously repeated his false accusation that Clemens had used steroids. At the time of the interview, McNamee knew that: Heyman would republish in an article on SI.com McNamee's

false accusation that Clemens had used steroids; SI.com is a web-based sports magazine accessible from any computer with Internet access; Heyman's SI.com article would be widely circulated to millions of Texas residents; his false accusation of steroid use would have a devastating impact on Clemens's reputation, emotions, and business interests; and Clemens would bear the brunt of the injury caused by McNamee's false accusation in Texas because Clemens lives, worked, and had significant business interests there. Heyman posted his article containing McNamee's false accusation on SI.com on January 7, 2008. By his malicious and intentional conduct, McNamee intended to—and did—cause enormous injury to Clemens in Texas.

36. Unbeknownst to Clemens until earlier this year, McNamee had previously told Andy Pettitte the same fiction that he told the Mitchell Commission and SI.com—that Clemens had used steroids and HGH. Specifically, McNamee falsely told Pettitte during a conversation in Clemens's home gym in Houston, Texas in 1999 or 2000 that Clemens had used HGH. And McNamee also falsely told Pettitte at Pettitte's home gym in Deer Park, Texas in 2003 or 2004 that Clemens had used steroids.

37. The false accusations made by McNamee that Clemens used steroids and HGH unfairly and improperly link Clemens's performance as a pitcher in 1998, 2000, and 2001 to the use of steroids and/or HGH during that time. This link is untrue and maliciously ignores Clemens's consistent record-setting performances before and after this period of time.

IV.

DEFAMATION—FALSE ACCUSATION OF STEROID USE

38. Clemens incorporates by reference the facts set forth above.

39. McNamee intentionally told Pettitte, the Mitchell Commission, and SI.com that Clemens had used steroids.

40. McNamee's accusation that Clemens had used steroids is absolutely false.

41. McNamee's false accusation that Clemens had used steroids is defamatory *per se* because it accused Clemens of committing crimes, injured his profession, business, and calling, and exposed him to public hatred, contempt, ridicule, and financial injury.

42. McNamee's false accusation that Clemens used steroids was made with actual malice because McNamee knew it was false.

43. The Mitchell Commission and SI.com republished McNamee's false accusation that Clemens had used steroids. At the time he falsely accused Clemens of having used steroids to Pettitte, the Mitchell Commission, and SI.com, McNamee knew that his false accusation would be communicated to other persons by them.

44. Until December 2007, Clemens did not know of and, in the exercise of reasonable diligence, should

not have known of, McNamee's false accusation that he had used steroids.

45. The law presumes that McNamee's false, defamatory *per se* statement that Clemens had used steroids injured Clemens. Moreover, as a proximate result of the publication and republication of McNamee's false accusation that Clemens had used steroids, Clemens's good reputation has been severely injured. In addition, McNamee's false allegation that Clemens had used steroids has also caused Clemens to suffer severe mental anguish, shame, public humiliation, embarrassment, and lost endorsement and business opportunities. Clemens seeks damages for these injuries from McNamee in an amount to be determined by a jury.

V.

DEFAMATION—FALSE ACCUSATION OF HGH USE

46. Clemens incorporates by reference the facts set forth above.

47. McNamee intentionally told Pettitte, the Mitchell Commission, and SI.com that Clemens had used HGH.

48. McNamee's accusation that Clemens had used HGH is absolutely false.

49. McNamee's false accusation that Clemens had used HGH is defamatory *per se* because it accused Clemens of committing crimes, injured his profession,

business, and calling, and exposed him to public hatred, contempt, ridicule, and financial injury.

50. McNamee's false accusation that Clemens used HGH was made with actual malice because McNamee knew it was false.

51. The Mitchell Commission and SI.com republished McNamee's false accusation that Clemens had used HGH. At the time he falsely accused Clemens of using HGH to Pettitte, the Mitchell Commission and SI.com, McNamee knew that his false accusation would be communicated to other persons by them.

52. Until December 2007, Clemens did not know of and, in the exercise of reasonable diligence, should not have known of, McNamee's false accusation that he had used HGH.

53. The law presumes that McNamee's false, defamatory *per se* statement that Clemens had used HGH injured Clemens. Moreover, as a proximate result of the publication and republication of McNamee's false accusation that Clemens had used HGH, Clemens's good reputation has been severely injured. In addition, McNamee's false allegation that Clemens had used HGH has also caused Clemens to suffer severe mental anguish, shame, public humiliation, embarrassment, and lost endorsement and business opportunities. Clemens seeks damages for these injuries from McNamee in an amount to be determined by a jury.

VI.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

54. Clemens incorporates by reference the facts set forth above.

55. McNamee falsely told Pettitte, the Mitchell Commission, and SI.com that Clemens had used steroids and HGH.

56. McNamee intended to cause Clemens to suffer severe emotional distress by making the false accusations.

57. McNamee's conduct in making the false accusations to Pettitte, the Mitchell Commission, and SI.com was extreme and outrageous.

58. McNamee's false accusations proximately caused Clemens to suffer severe emotional distress. Clemens seeks damages for these injuries from McNamee in an amount to be determined by a jury.

VII.

EXEMPLARY DAMAGES

59. Clemens incorporates by reference the facts set forth above.

60. Clemens is entitled to exemplary damages from McNamee because McNamee's conduct described above was malicious and grossly negligent.

VIII.

JURY DEMAND

61. Clemens demands a trial by jury on all issues.

IX.

PRAYER FOR RELIEF

62. Clemens requests that on final trial he recover judgment against McNamee for:

a. Actual damages in a sum to be determined by the jury;

b. Exemplary damages in a sum to be determined by the jury;

c. Pre- and post-judgment interest as provided by law;

d. Costs of suit;

e. Such other and further relief to which Clemens may be justly entitled.

Respectfully submitted,

/s/ Rusty Hardin
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[Certificate of Service Omitted in Printing of this Appendix]

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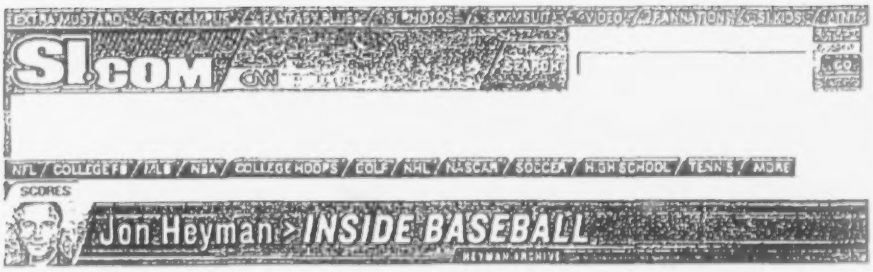
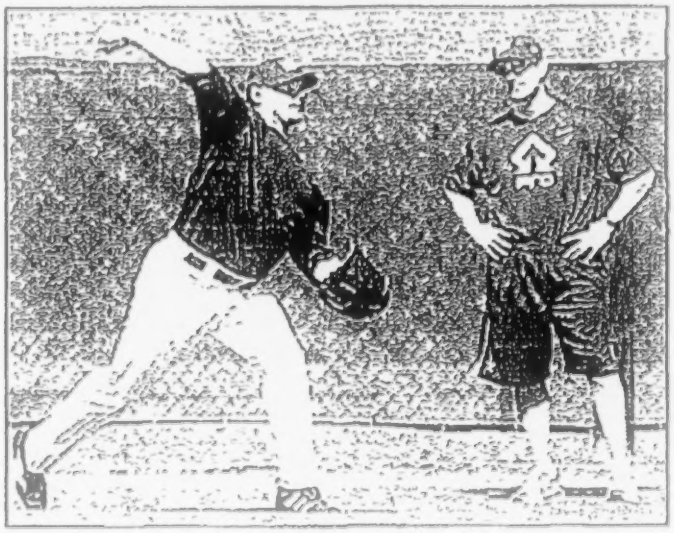
APPENDIX F



Exclusive: McNamee stands by story
Clemens' ex-trainer reacts to *60 Minutes* interview
Posted: Monday January 7, 2008 6:57PM;
Updated: Tuesday January 8, 2008 8:37AM



Roger Clemens trained with Brian McNamee as recently as February 2006 with the Houston Astros.

AP

Brian McNamee sits mostly stone-faced as **Roger Clemens**, his onetime client, brings the heat. "Ridiculous," "hogwash" -- terms used by the seven-time Cy Young Award winner to discredit McNamee's bombshell testimony in the Mitchell Report, in which the longtime personal trainer told investigators that he had injected Clemens with HGH and anabolic steroids -- fail to break McNamee's calm.

Sitting on the couch of his bungalow by a Long Island beach, in an exclusive interview with *Sports Illustrated*, his first public words since the release of the Mitchell Report on Dec 13, McNamee occasionally interjects as **Mike Wallace** interviews Clemens on *60 Minutes*. At times he is even complimentary of his client-turned-combatant.

His mood darkens, however, when Wallace asks Clemens, "What did McNamee gain by lying?"

"Evidently not going to jail," the pitcher replies.

"Jail time for what?" Wallace asks.

"Well, I think he's been buying and movin' steroids."

"I'd rather be called a liar than a drug pusher," McNamee says, his voice rising.

He gathers himself, then continues "The feds look at bank accounts, and there's no money unaccounted for. I don't launder money. I don't have anything in my mattress. If I was pushing drugs, what did I do with the money?"

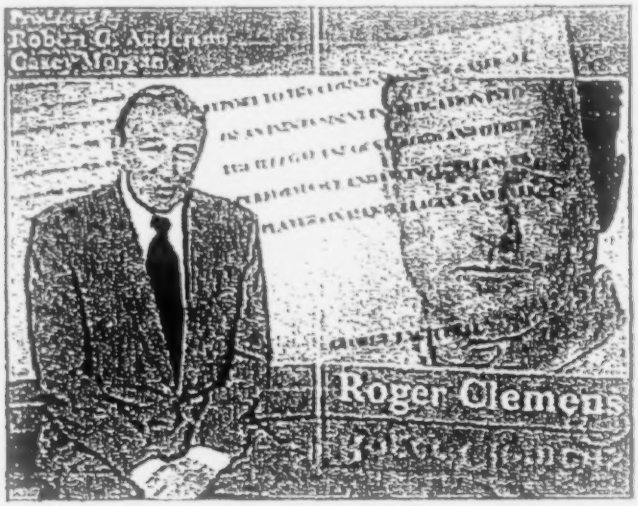
As suddenly as the storm arrived, it passes. His eyes maneuver between his 23-inch television and a computer monitor that is providing minute-by-minute reviews of Clemens' interview. The trainer reads aloud from e-mails that are supportive of him. He stops to hear Clemens acknowledge that McNamee did, in fact, inject him -- only with the anesthetic lidocaine and B-12 vitamins rather than with HGH and anabolic steroids. "That's news to me," McNamee says. But the edge is gone now. He explains that such shots are administered through the arm and not the butt and implores Wallace to ask the pitcher where he got such prescription drugs. Wallace does not.

When Clemens claims to have no knowledge that **Andy Pettitte** -- Clemens' close friend and training partner, and another former client of McNamee -- had twice taken HGH, thus corroborating McNamee's testimony in the Mitchell Report, the trainer interjects, "I believe that."

As the *60 Minutes* interview draws to a close, Clemens, who will repeat his denials in a news conference the next day, discusses the possibility of taking a lie detector test. "I think he's the one guy who could probably beat the test," McNamee opines. "He might actually believe that he's telling the truth."

McNamee apparently still admires Clemens very much, so much that he insists that the 45-year-old right-hander belongs in the Hall of Fame. And though his lawyers have threatened a defamation lawsuit against Clemens, McNamee says he hopes it doesn't come to a courtroom. "I'd like it all to just fade away," he says. (Word would come late on Sunday night that Clemens had filed a defamation suit of his own.)

But to testify truthfully, McNamee explains, was the only way to avoid prosecution. "I shouldn't have done it," he says of his steroid involvement. "I made a mistake. And I stopped it."



Mike Wallace's interview with Roger Clemens aired on CBS' 60 Minutes on Sunday night.

CBS

What McNamee says he did back then was to educate players in what he recognized to be a steroid epidemic. He says he didn't push players to performance-enhancing drugs, but only helped steer them to safer drugs if they were already so inclined. "I made a mistake [out of] loyalty to others," is how he puts it.

Safer performance-enhancing drugs, McNamee explains, is what drew him to **Kirk Radomski**, the former New York Mets' clubhouse attendant who has pleaded guilty to distributing steroids and money laundering. McNamee, then a Yankees strength and

conditioning coach, became acquainted with Radomski, whom he learned through a mutual acquaintance might be able to get him a deal on a Lexus. Soon McNamee started buying steroids from Radomski, whom he saw as a trusted source of quality performance-enhancing drugs. McNamee sees himself as someone who only did what his big-name clients requested, faithfully carrying out orders.

Clemens and McNamee had hit it off almost immediately in Toronto in the late 1990s, when Clemens was a four-time Cy Young Award winner thought to be near the end of a Hall of Fame career. Defying the odds, Clemens won three more Cy Youngs, aided in part, according to the Mitchell Report, by performance-enhancing drugs procured by McNamee. The Mitchell Report states that McNamee shot up Clemens between 16 and 21 times with as many as three different steroids and HGH over the 1998, 2000 and 2001 seasons. On numerous occasions, including an SI.com interview in 2006, McNamee had denied any involvement with steroids. "I looked at them like white lies," McNamee says. "I was doing clinics and getting mail from high school coaches, and the topic would always come up. Why did they need to hear the truth and take away from my program of smart training, eating well and working hard? There really were no shortcuts."

McNamee says no one ever outworked Clemens, but McNamee said under oath that Clemens had artificial help. He saw noted West Coast trainer **Greg Anderson** go to prison rather than testify about his star client, **Barry Bonds**. But McNamee has three young children and wouldn't think of choosing Clemens over them. (Though in a taped phone call

from last Friday played at Clemens' press conference on Monday afternoon, McNamee would offer to go to jail on Clemens' behalf.)

"Faced with the situation I was faced with, I had no choice," McNamee says. "I didn't want to do it. I have a 10-year-old and a 7-year-old and I don't want them taking steroids. I'm embarrassed. I wish I had nothing to do with it."

"And Roger was in no way an abuser of steroids. He never took them through our tough winter workouts. And he never took them in spring training, when the days are longest. He took them in late July, August, and never for more than four to six weeks max . . . it wasn't that frequent."

—Brian McNamee

McNamee still holds Clemens in high regard, in part because he admires the pitcher's tireless work ethic, and also because he believes that Clemens was only one of many players using performance enhancers. "It's sad," McNamee says. "He was a mentor to me. Roger is an unbelievable family man. I learned how to treat my kids from Roger. And Roger was in no way an abuser of steroids. He never took them through our tough winter workouts. And he never took them in spring training, when the days are longest. He took them in late July, August, and never for more than four to six weeks max . . . it wasn't that frequent."

"Within the culture of what was going on, he was just a small part of it. A lot of guys did it. You can't take away the work Roger did. You can't take away the fact that he worked out as hard as anybody." When McNamee, also a former strength and conditioning coach with the Blue Jays from 1998 through 2000, is asked to estimate how many major leaguers were involved with steroids during that period, he answers without hesitation. "More than half," he says.

McNamee speaks fondly about his successful pairing with Clemens; apparently, he hasn't quite let go. There are signs that he'd like their old relationship back. Clemens revealed on *60 Minutes* that McNamee emailed him for fishing tips days before Mitchell's findings were divulged without hinting what was to come, an assertion that McNamee didn't deny.

McNamee explains that he was prohibited from revealing to anyone what he had told Mitchell. "It was killing me," he says. "I got sick I could not talk about it. It was a federal investigation." McNamee also explains that at the time he was still reasonably hopeful that none of the names Mitchell learned from him or anyone else would be made public. "Why would I tell Roger or Andy something they might not even find out about?" he says.

McNamee received the first call from the feds way back in May. "I was pretty compelled to tell the truth," is the way McNamee put it. "It made me sick," he says. "I was hospitalized for the stress."

Three months later, in August, he was called before Mitchell, and asked to nod to what he told the feds the month before. When he was done nodding, he says

Mitchell hugged him. But he claims he took no pride in it.

"I made a mistake. And obviously, I paid for it tenfold," McNamee says.

McNamee says Clemens paid him fairly -- "he paid me a decent wage, nothing more, nothing less; I helped make him millions." He talks often about his kids, and a neat but tall stack of diapers on the dining room table suggests that he's heavily involved in their lives. His training business also is far from hurting. There are weights in a small front room of the bungalow, and he appears to have a full training schedule -- though, of course none of the clients are of Clemens' ilk.

While his rented house is rather small, it is located in a desirable community only blocks from the beach. It isn't close to Clemens' palace, but it is homey. Considering all that's gone on, he also appears to have more peace of mind than you'd think despite the stress. "I'll land on my feet," he says. "I'll get by."

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No. 10-966

Supreme Court, U.S.
FILED
APR 14 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

WILLIAM ROGER CLEMENS,

Petitioner,

v.

BRIAN MCNAMEE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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April 14, 2011

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QUESTION PRESENTED

Did the Fifth Circuit err in affirming dismissal of petitioner's defamation claims for lack of personal jurisdiction based on a conclusion that a plaintiff's damage in the forum state cannot alone support specific jurisdiction when the statements at issue were made elsewhere and lacked any connection with the forum state in "content or context"?

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STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner seeks review of the Fifth Circuit's factbound decision in an attempt to force a New York citizen to go to Texas to defend against claims based on statements he made in New York, about activities in New York and Canada. But the decisions of the court of appeals and district court, finding due process does not allow Texas courts to exercise jurisdiction simply because petitioner lives there, reflected a straightforward application of well-established case law. As the court of appeals explained, the sole question before it was, "whether allegedly defamatory statements made elsewhere but which caused damage to the plaintiff in the forum state are sufficient to confer personal jurisdiction over the defendant when the content and context of the statements lack any connection with the forum state." App. 1a-2a. The answer to this question under the law of this Court, and of each circuit, is the same: No. Petitioner does not suggest otherwise as to this dispositive question – but instead discusses at length a purported "circuit split" on a separate and independent issue not even addressed by the court of appeals majority.

B. FACTUAL BACKGROUND

The facts of this case are quite simple. In 2007, respondent Brian McNamee, a New York resident and personal trainer, was approached by federal authorities in connection with their investigation of BALCO,

a California laboratory allegedly involved in the development and sale of performance-enhancing drugs to athletes. App. 3a. In exchange for cooperation with the investigation, McNamee was given use immunity by the United States Attorney's Office for the Northern District of California. *Id.* Over a two-day interview, McNamee told investigators he had injected his former client, professional baseball player and Texas resident petitioner Roger Clemens, with performance-enhancing drugs in 1998, 2000, and 2001, in Toronto and New York. *Id.* The same federal authorities then required McNamee, as part of his immunity agreement, to cooperate with an investigation being conducted by former U.S. Senator George Mitchell, under the auspices of Major League Baseball, in response to a congressional inquiry. *Id.* These authorities arranged for McNamee to meet with Mitchell in New York, and participated in the meeting between Mitchell and McNamee. *Id.* McNamee repeated the same statements that he had made to the federal investigators, and those statements were included in a report issued on December 12, 2007, entitled *Report to the Commissioner of Baseball of an Independent Investigation Into the Illegal Use of Steroids and Other Performance Enhancing Substances By Players In Major League Baseball* ("the Mitchell Report"). *Id.* Mr. McNamee also later repeated these statements in an interview with John Heyman, a reporter for the internet site SI.com, conducted at his New York home, which were incorporated into an article posted on the site on January 7, 2008. *Id.* at 4a.

C. THE DISTRICT COURT'S RULING

In January 2008, Clemens initiated this action for defamation against McNamee in Texas state court, claiming the statements were false. App. at 46a. McNamee removed the action to the District Court for the Southern District of Texas, and, *inter alia*, moved to dismiss on the grounds that (1) the court lacked personal jurisdiction over McNamee, and (2) that McNamee was entitled to immunity for statements made to the Mitchell Commission.

The district court granted McNamee's motion in both respects.[1] As to the jurisdictional challenge, the court held that, in order to satisfy due process,[2] Clemens was required to show: "(1) McNamee purposefully availed himself of the benefits and protections of Texas law, thereby establishing 'minimum contacts' with Texas such that McNamee could reasonably have anticipated being haled into court there; and (2) under the circumstances, the exercise of personal jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" App. at

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[1] Clemens had initially brought claims based on conversations between McNamee and baseball player Andy Pettitte in 1999 or 2000 and 2003 or 2004. In its order, the district court granted Clemens leave to amend his claim regarding the statements to Pettitte. Clemens did not do so and rather stipulated to dismissal of that claim with prejudice, those claims were voluntarily dismissed with prejudice in October 2009.

[2] The court and parties agreed that the Texas long-arm statute is coterminous with the Due Process Clause of the Fourteenth Amendment. App. 47a.

47(a) (citing *Command-Aire Corp. v. Ontario Mechanical Sales and Service Inc.*, 963 F.2d 90, 94 (5th Cir. 1992)). Applying the "effects test" set out by this Court in *Calder v. Jones*, 465 U.S. 783 (1984), and elaborated upon by the Fifth Circuit in *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005) and *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002), the court rejected Clemens's arguments that jurisdiction was appropriate. App. at 49a-53a. The court noted that, though "McNamee knew that Clemens would feel the brunt of the harm from his statements in Texas," it lacked jurisdiction, "because the focal point of McNamee's publication was not Texas." *Id.* at 52a. The court based this conclusion on multiple facts: "McNamee's statements to Mitchell and Heyman did not mention Texas, they were not drawn from Texas sources, and, if anything, they was [*sic*] just as likely to attract the interest of New York Yankees fans as that of Houston Astros fans. The geographic focus of McNamee's statements was undoubtedly New York." *Id.* at 53a.

The court also concluded, in the alternative, "that McNamee's statements to Mitchell should be treated with immunity." App. at 59a. Upon reviewing supplemental material, including declarations of an Assistant United States Attorney and McNamee's counsel, the court determined that summary judgment was appropriate on this issue, applying Texas law, which provides that "statements made to government agencies as part of legislative, judicial, or quasi-judicial proceedings are entitled to absolute

immunity so long as they are made as part of an ongoing proceeding, they are not unsolicited, and they are made to an agency whose findings need not be approved or ratified by another agency." App. at 60a (citing *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 994 (5th Cir. 1999)). The court held this standard was met and that "McNamee was compelled to make his statements to Mitchell as part of a judicial proceeding," given that McNamee only spoke to the Mitchell Commission as "part of his co-operation with the [federal criminal] investigation in order to maintain his witness status," and the meeting was facilitated by the United States Attorney's Office. *Id.* at 61a-63a.[3]

D. THE FIFTH CIRCUIT'S RULING

The court of appeals affirmed. *Id.* at 1a-10a. The court considered the question before it to be a narrow one: "whether allegedly defamatory statements made elsewhere but which caused damage to the plaintiff in the forum state are sufficient to confer personal jurisdiction over the defendant when the content and context of the statements lack any connection with the forum state," and answered in the negative. *Id.* at 1a-2a.

The court held that, in order to establish specific personal jurisdiction over McNamee, Clemens needed

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[3] Clemens later filed a motion for reconsideration on this second ground, which was denied. App. at 29a-41a.

to make a prima facie showing that McNamee *both* "purposefully directed activities in the forum . . . such that he could reasonably anticipate being haled into court in the forum state" *and* that there was "a sufficient nexus between the non-resident's contacts with the forum and the cause of action." *Id.* at 6a (citing *Burger King v. Rudzewicz*, 471 U.S. 462, 472, 474 (1985) and *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414 n. 8 (1984)).

The court only considered the first of these two requirements, and concluded jurisdiction was lacking, since "the relevant contacts from which Clemens's cause of action arises are the allegedly defamatory remarks about Clemens which McNamee made to the Mitchell Commission and John Heyman of SI.com," and those remarks did not constitute "purposeful availment" of the forum of Texas. *Id.* at 6a-9a. In reaching this conclusion, the court analyzed *Calder*, *Fielding*, and *Revell*, and noted it "read *Calder* as requiring the plaintiff seeking to assert specific personal jurisdiction over a defendant in a defamation case to show '(1) the subject matter of and (2) the sources relied upon for the article were in the forum state.'" *Id.* at 9a.

Rejecting Clemens's arguments, the court found this standard was not met simply by the "harm he suffered in Texas and [ ] McNamee's knowledge of the likelihood of such damage in the forum." *Id.* In explaining its conclusion that Clemens had "not made a prima facie showing that McNamee made statements in which Texas was the focal point," the court pointed

out that "the statements did not concern activity in Texas; nor were they made in Texas or directed to Texas residents any more than residents of any state." *Id.*

Because of its conclusion on the issue of purposeful availment, the court did not address the "arising out of or related to" requirement, nor did it address the alternative holding regarding immunity.

Judge Haynes dissented, contending that *Calder* did not need to be applied to the case – an argument not made by Clemens – because McNamee had years earlier trained Clemens in Texas, App. at 13a-20a, and that, even if it did, Clemens's residence in Texas was in and of itself sufficient to meet the *Calder* standard, *id.* at 21a-25a. Judge Haynes did not address the immunity issue. *Id.* at 11a, n. 1.

Clemens petitioned for rehearing *en banc*, which the court of appeals denied, with "no member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc." *Id.* at 72a.

REASONS FOR DENYING THE PETITION

The Fifth Circuit's factbound decision, affirming the dismissal of the action for lack of personal jurisdiction, does not warrant further review. It does not conflict with the decision of any other federal court of appeals or any precedent of this Court. In fact, the

issue that Petitioner focuses on in seeking review was not even addressed by the court of appeals majority, as the issue it did reach is independently dispositive. Moreover, there was an alternate state law ground for dismissal, as determined by the district court, not reached by the court of appeals.

I. THE FIFTH CIRCUIT'S CONCLUSION THAT DAMAGE TO THE PLAINTIFF IN THE FORUM STATE IS INSUFFICIENT TO CONFER PERSONAL JURISDICTION DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS OR OF THIS COURT

As noted above, the court of appeals considered there to be only one, dispositive question before it: "whether allegedly defamatory statements made elsewhere but which caused damage to the plaintiff in the forum state are sufficient to confer personal jurisdiction over the defendant when the content and context of the statements lack any connection with the forum state." App. at 1a-2a. In answering this question in the negative, the court of appeals applied well-established case law to hold that jurisdiction was improper for one reason – that McNamee's statements did not constitute "purposeful availment" of a Texas forum under the "effects test" of *Calder v. Jones*, 465 U.S. 783 (1984).

The Court of Appeals's decision faithfully applied a long line of Fifth Circuit precedent which makes clear that a plaintiff's mere "suffering of harm" in the

forum state is insufficient evidence of purposeful availment. *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002); *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 867 (5th Cir. 2001) (per curiam); *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005). This case law is not only consistent with *Calder v. Jones*, 465 U.S. 783 (1984), but also in accordance with the law of every circuit that has considered the issue, each of which has held that the effects upon a plaintiff within the forum state – foreseeable or not – are alone insufficient to support personal jurisdiction, absent any other showing of targeting a forum.[4] *See, e.g.*, *Johnson v. Arden*, 614 F.3d 785, 797 (8th Cir. 2010); *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008) (abrogated on other grounds by *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010)); *Marten v. Godwin*, 499 F.3d 290, 297-98 (3d Cir. 2007); *Air Prods. & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544, 552

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[4] Notably, the Fifth Circuit case law the court of appeals relied on here has been expressly embraced by a number of its sister circuits. *See, e.g., Shrader v. Biddinger*, 633 F.3d 1235, 1241, 1244 (citing *Revell*) (10th Cir. 2011); *Cadle Co. v. Schlichtmann*, 123 F. App'x 675, 679-80 (6th Cir. 2005) (citing *Revell*). *Revell* itself also relied on precedent from other circuits that have held that mere knowledge of plaintiff's residence in the forum state is insufficient to constitute purposeful availment. 317 F.3d at 473-75 (looking to and approving of *Reynolds v. Int'l Amateur Athletic Federation*, 23 F.3d 1110, 1120 (6th Cir. 1994), *Young v. New Haven Advocate*, 315 F.3d 256, 261-62 (4th Cir. 2002), and *Remick v. Manfredy*, 238 F.3d 248, 257-59 (3d Cir. 2001)).

(6th Cir. 2007); *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1158 (9th Cir. 2006).

One such case, *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir. 1994), involved remarkably similar facts. There, a professional athlete who lived in Ohio sued a London-based international athletic federation for defamation based upon a press release it had issued in London stating that a urine sample taken from him in Monaco had tested positive for drugs in a Paris laboratory. 23 F.3d at 1112-14. Though the federation knew its statement would likely have effects in Ohio, the Sixth Circuit held plaintiff's claim of personal jurisdiction failed for a lack of "purposeful availment." *Id.* at 1116-20. The court distinguished *Calder* on many of the same bases as the court of appeals did here:

> First, the press release concerned Reynolds' activities in Monaco, not Ohio. Second, the source of the controversial report was the drug sample taken in Monaco and the laboratory testing in France. Third, Reynolds is an international athlete whose professional reputation is not centered in Ohio. Fourth, the defendant itself did not publish or circulate the report in Ohio; Ohio periodicals disseminated the report. Fifth, Ohio was not the "focal point" of the press release. The fact that the IAAF could foresee that the report would be circulated and have an effect in

> Ohio is not, in itself, enough to create personal jurisdiction.

Id. at 1120. Far short of a disagreement between circuits, there is absolute harmony.

Petitioner points to case law from the Seventh and Tenth Circuits as evidence of a circuit split on this issue. Pet. at 25-26. But this is simply incorrect. Just weeks ago, the Tenth Circuit reiterated its holding that, it has taken a "more restrictive approach" to applying the "expressly aimed" requirement of *Calder*, and thus, to support the exercise of jurisdiction, "*the forum state itself must be the focal point of the tort.*" *Shrader v. Biddinger*, 633 F.3d 1235, 1244 (10th Cir. 2011) (emphasis in original) (citing *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1074 n.9 (10th Cir. 2008)). Thus, where the content of an internet forum message – alleged to defame an Oklahoma resident – was "geographically neutral," and the facts suggested that the post was targeted "at a nation-wide or world-wide audience," the Tenth Circuit held due process did not allow the exercise of personal jurisdiction.

Likewise, the Seventh Circuit has recently reaffirmed that it has "rejected the contention that *Calder* meant 'any plaintiff may hale any defendant into court in the plaintiff's home state, where the defendant has no contacts, merely by asserting that the defendant has committed an intentional tort against the plaintiff.'" *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston*

Metroplex, P.A., 623 F.3d 440, 445 (7th Cir. 2010). *See also uBID, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 427 n.1 (7th Cir. 2010) ("*Calder* can be read as authorizing personal jurisdiction in the home state of the victim of almost any alleged intentional tort, but it need not and should not be read quite so broadly.").

Petitioner argues that other courts of appeals have, on other factual allegations, concluded that *Calder can* be satisfied upon a plaintiff's showing of facts aside from a defamatory statement's reference to the plaintiff's forum activities or that the statement is drawn from forum sources. Pet. at 26. Even if this is so, in this case this is a distinction without meaning. The court of appeals here did not say that Clemens could *only* satisfy *Calder* by such a showing. But here there were *no* facts other than the plaintiff's residence that could demonstrate purposeful availment or "express aiming."[5] In *Gordy v. Daily News, L.P.*, 95 F.3d 829, 831 (9th Cir. 1996), for example, the court concluded California had jurisdiction where an alleged defamatory statement was contained in a newspaper that the defendant itself circulated in California, and the article in question relied on calls to California sources. And in *Burt v. Board of Regents of University of Nebraska*, 757 F.2d 242 (10th Cir. 1985), the court found jurisdiction in Colorado over a suit based upon letters a defendant

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[5] Nor has Clemens suggested any in his petition. *See* Pet. at 22-28 (focusing on whether the allegedly defamatory statements themselves constituted "express aiming").

wrote and mailed specifically to Colorado hospitals. These cases are easily distinguishable from the case here on their facts, and in no way demonstrate a circuit split, nor do they suggest that *Calder* can ever be satisfied solely by a plaintiff's residence in a forum state.

II. THIS IS NOT THE APPROPRIATE CASE TO SETTLE THE ISSUE OF THE CONNECTION NECESSARY FOR CLAIMS TO "ARISE OUT OF OR RELATE TO" CONTACTS IN ORDER TO SUPPORT SPECIFIC PERSONAL JURISDICTION

Clemens spends the majority of his petition arguing that there is a decades-old circuit split over the standard to use to determine whether given claims "arise out of or relate to" contacts with a forum, and this Court should thus step in to set forth one standard. Pet. 9-20. But the court in this case did not address this issue *at all* and ruled on entirely independent and adequate grounds. Moreover, Clemens did not raise this issue in the Court below. Thus, this case is not an appropriate vehicle for the Court to address a split posed by other cases. As this Court has repeatedly noted, "we are a court of review, not of first view." *Skinner v. Switzer*, 131 S. Ct. 1289, 1300 (2011) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005)). *See also Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 56 n. 4 (2002) (refusing to consider argument not raised below as waived); *Bragdon v. Abbott*, 524 U.S. 624,

638 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals. . . ."); *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 164 (1975) (noting policy of declining to consider a claim without lower court opinion on the same issue). If the issue is as important and frequently-recurring as petitioner insists, that is all the more reason for the Court to wait for a case unlike this one where the issue is actually decided below and where it would affect the outcome.

Additionally, even though the courts of appeals have formulated different standards for determining whether given claims "arise out of or relate to" forum contacts, under none of those standards would McNamee's prior isolated visits to train Clemens in Texas be deemed sufficiently related to Clemens' claims in this action to support a finding of personal jurisdiction.

A. The Court of Appeals Did Not Reach the Question and Ruled on Alternate, Independently Sufficient Grounds

Petitioner tries to obscure the fact that he seeks review of a question not addressed by the majority by focusing almost entirely on the dissent, Pet. at 21-22, and selectively quoting and emphasizing one sentence from the majority opinion, from a passage where the Court used the word "arise" when addressing the "purposeful availment" requirement, *not* the "arise out of or relate to" issue. Pet. at 21, citing App. 6a-7a.

As noted above, the court of appeals held that a plaintiff must make a prima facie case that the defendant "purposefully directed activities in the forum . . . such that he could reasonably anticipate being haled into court in the forum state" *and* that there was "a sufficient nexus between the non-resident's contacts with the forum and the cause of action." *Id.* at 6a (citing *Burger King*, 471 U.S. at 472, 474 and *Helicopteros Nacionales de Colombia*, 466 U.S. at 414 n. 8). This two-pronged requirement is compelled by the text of *Burger King* itself, where this Court held that due process "is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, *and* the litigation results from alleged injuries that 'arise out of or relate to' those activities." 471 U.S. at 472-73 (emphasis added, citations omitted). The Fifth Circuit's conclusion that *both* of these elements must be met is in accordance with the law of every other circuit. *See, e.g.*, *Adams v. Adams*, 601 F.3d 1, 5 (1st Cir. 2010); *In re Terrorist Attacks*, 538 F.3d at 93 (2d Cir. 2008); *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 317 (3d Cir. 2007); *Consulting Engineers Corp. v. Geometric Ltd.*, 561 F.3d 273, 278 (4th Cir. 2009); *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 904 (6th Cir. 2006); *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.*, 623 F.3d 440, 444 (7th Cir. 2010); *Johnson v. Arden*, 614 F.3d 785, 794-95 (8th Cir. 2010); *King v. Am. Fam. Mut. Ins. Co.*, 632 F.3d 570, 579-80 (9th Cir. 2011); *Shrader*, 633 F.3d at 1239 (10th Cir. 2011); *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922 (11th Cir. 2007); *Mwani v. bin*

Laden, 417 F.3d 1, 12 (D.C. Cir. 2005); *Nuance Commc'ns, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1231 (Fed. Cir. 2010).

The court of appeals here – appropriately – did not reach the second prong, which petitioner focuses on, and thus it cannot be said that the opinion below implicates a circuit split on this second prong. Thus, if a defendant has not purposefully directed activities in the forum, a court need not consider whether the claim arises out of or relates to forum activities.

B. Applying Any of the Tests in Use By Any Circuit, McNamee's Earlier Visits to Texas Were Not Sufficiently Related to Clemens's Claims

Even if the court of appeals *had* considered the issue of the extent to which petitioner's claims arose out of or related to McNamee's limited Texas contacts, it would not have mattered which of the three tests employed by the courts of appeals was used, as under each test the result would have been the same: the contacts with Texas were not remotely connected to Petitioner's claims.[6]

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[6] Petitioner, in the interest of maximizing the impression of discord and confusion has grouped the different tests used into five or six categories. We follow the many courts and commentators in highlighting the three dominant approaches – but nothing turns on particularities of classification: (1) we do not dispute that there are differing approaches but (2) as we show, no decisional approach – however they are divided or subdivided

(Continued on following page)

Petitioner argues that McNamee's visits to Texas to train Clemens and/or other professional athletes years prior to the statements at issue were sufficiently related to his defamation claims. Under each of the three approaches followed by various courts, though, this argument fails. Notably, Petitioner does not even argue in his brief how any of these tests would affect the outcome of this case.

1. The "Proximate Cause" or "Substantive Relevance" Test

To meet the "proximate cause" test applied by multiple courts, discussed by Petitioner at pp. 11-12, "the defendant's in-state conduct must form an important, or at least material, element of proof' in the plaintiff's case." *Harlow v. Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005) (internal citations omitted).[7] This test has also been referred to as a "substantive relevance" test, which "examines whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim." *O'Connor v. Sandy*

– would yield a different conclusion here. *See, e.g., Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1160-61 (10th Cir. 2010) (identifying three tests); *O'Connor*, 496 F.3d at 318 (same).

[7] The "meaningful link" test the First Circuit applied in *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 716 (1st Cir. 1996), and has not since, was characterized as merely a "slight loosening" of the proximate cause test. *See also O'Connor*, 496 F.3d at 319.

Lane Hotel Co. Ltd., 496 F.3d 312, 319 (3d Cir. 2007) (cited at Pet. 12-13).

There can be no contention here that McNamee's visits to Texas are elements of the defamation claims for statements in New York years later, the merits of which hinge on whether McNamee injected Clemens with illegal substances in Toronto and New York. *See WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998) ("To maintain a defamation cause of action, the plaintiff must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement.").

2. The "But For" Test

Under the second most permissive standard, the "but for" test, courts have asked whether, "'but for' the contacts between the defendant and the forum state, the cause of action would not have arisen." *Terracom v. Valley National Bank*, 49 F.3d 555, 561 (9th Cir. 1995); *see also Diamond Crystal Brands, Inc. v. Food Movers Int'l. Inc.*, 593 F.3d 1249, 1273 (11th Cir. 2010). The facts in this case do not meet this standard either. McNamee and Clemens met when the Toronto Blue Jays hired him to train Clemens. App. at 78a-79a. McNamee injected Clemens with steroids in Toronto and New York, never in Texas. *Id.*

at 3a. McNamee trained him in cities throughout the United States and Canada – particularly Toronto and New York, after Clemens began to play for the New York Yankees. *Id.* at 79a-81a. McNamee's visits to train Clemens or other athletes in Texas were in no way a but for cause of McNamee's statements in New York that form the basis of Clemens's claim.

3. The "Substantial Connection" Test

The final, most flexible test requires that "the cause of action, of whatever type, have a substantial connection with the defendant's in-state activities." *Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir. 2002). Although flexible, this test still requires that the "operative facts of the controversy" be related to the defendant's contact with the state. *Id.* The cause of action must have been "made possible by" or "lie in the wake" of the forum contacts. *Lanier v. Am. Bd. of Endodontics*, 843 F.2d 901, 909 (6th Cir. 1988), cited in *Air Prods. & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544 (6th Cir. 2007).[5] The cases cited by Petitioner do not suggest otherwise.

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[5] Although Petitioner contends circuits other than the Sixth Circuit "have applied" this test, no other circuit currently endorses this test, and the cited cases do not suggest otherwise. Instead, the circuits cited by Petitioner as adopting this test have simply declined to adopt a specific test beyond the words "arises out of or relates to." *See, e.g., Diamond Crystal Brands, Inc.*, 593 F.3d at 1273 (11th Cir. 2010) ("This circuit has not adopted a rigid approach to determining when contacts 'arise

(Continued on following page)

Even under this most permissive standard, petitioner cannot show that his claims "arise out of or relate to" McNamee's Texas contacts. In no way is a defamation claim arising out of statements made in New York, to non-Texas residents, about injecting steroids in Toronto and New York, "made possible" by McNamee's trips to train Clemens at his home over the course of a multi-year relationship centered in Toronto and New York.

Since any circuit split on this issue is irrelevant to *this* case, as the result would be the same under the standards applied by each of the courts of appeals, this case does not present an appropriate vehicle to resolve any differences among those courts. Indeed, if the issue is as frequently recurrent as petitioner claims (Pet. at 18-20), that is reason for denying review here, and adhering to this Court's ordinary practice of deciding issues in cases where they were considered by the court below and are outcome-affecting.

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out of or relate to' a cause of action."); *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) (declining to adopt a specific test); *Akro Corp. v. Luker*, 45 F.3d 1541, 1547 (Fed. Cir. 1995) (using standards of other circuits as "guideposts"); *City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484, 487 (4th Cir. 1985) (not specifying any standard); *Harrell v. Duke University Health System, Inc.*, C.A. No. 7:07-813-HMH, 2008 WL 80122, at *2 (D.S.C. Jan. 7, 2008) ("the United States Court of Appeals for the Fourth Circuit has not adopted one of the various approaches for making this determination").

III. CERTIORARI IS ALSO INAPPROPRIATE GIVEN THE DISTRICT COURT'S ALTERNATIVE STATE LAW GROUNDS FOR DISMISSAL OF SOME CLAIMS

In addition to dismissing the Complaint on jurisdictional grounds, the district court *also* dismissed some of Petitioner's claims on the basis that, under Texas law, Respondent is absolutely immune for the allegedly defamatory statements.[9] This alternate ground for affirmance makes certiorari particularly inappropriate.

As the district court held, based on well-established Texas law, a witness cannot be prosecuted for statements made during the course of a government investigation. App. at 59a-63a (citing *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 991 (5th Cir. 1999)). Here, because McNamee's statements to Senator Mitchell were compelled as part of a governmental investigation (an investigation that has since led to plaintiff's indictment), they are immune from suit.

Because the court of appeals held that the courts in Texas lacked personal jurisdiction over McNamee, it did not reach the question of whether the statements were absolutely immune from suit. If, however, this Court were to reverse the court of appeals and

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[9] The immunity analysis was limited to the claims concerning McNamee's statements to the Mitchell Commission, which are at the heart of the Complaint, and did not apply to the statement to SI.com.

find that there was jurisdiction over McNamee, an alternative state law basis for affirmance would need to be considered. The existence of this question of state law makes the case particularly inapt for certiorari review. *See, e.g.*, *N.C.P. Marketing Grp., Inc. v. BG Star Prods., Inc.*, 129 S. Ct. 1577 (2009) (Statement of Kennedy, J., joined by Breyer, J., respecting denial of certiorari).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 14, 2011

187 (2)

Supreme Court, U.S.
FILED
MAY 10 2011
OFFICE OF THE CLERK

No. 10-966

In the
Supreme Court of the United States

WILLIAM ROGER CLEMENS,
Petitioner,

v.

BRIAN McNAMEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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Respondent Brian McNamee implicitly concedes that the primary issue before the Court—the connection required between a plaintiff's claim and a nonresident defendant's forum contacts to permit the exercise of specific personal jurisdiction—is worthy of the Court's attention, but argues that this case is not the proper vehicle to address the issue. McNamee's arguments lack merit for several reasons.

I. Clemens Did Not Waive The Argument That His Claims Are Related To McNamee's Texas Contacts.

Clemens argued in the court of appeals that "the Due Process Clause permitted the district court to exercise personal jurisdiction over McNamee because . . . McNamee established 'minimum contacts' with Texas, and Clemens's claims arise from, or are directly related to, those contacts . . . ." Reply App. 10a. Clemens noted that his claims arose from or were related to, among other contacts, McNamee's Texas business contacts and McNamee's prior false statements made to Andy Pettitte while in Texas. *See* Reply App. 13a-14a.

McNamee argued in response that "McNamee's alleged contacts with Texas are unrelated to Plaintiff's claims and thus irrelevant." Reply App. 17a. In reply, Clemens argued that "Clemens's defamation claims all arise from or are related to McNamee's business contacts with Texas[]" and "Clemens' existing defamation claims based on McNamee's statements to the Mitchell Commission and SI.com arise from or are related to McNamee's false statements to Pettitte . . . ." Reply App. 23a. Finally, at oral argument, Clemens again argued that his claims are related to McNamee's

Texas contacts. *See Clemens v. McNamee*, No. 09-20265, Oral Argument at http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx. Having raised the argument that his claims are related to McNamee's Texas contacts at every opportunity before the court of appeals, Clemens did not waive it.

II. The Majority Opinion's Silent Rejection Of Controlling Authority Cannot Immunize Its Decision From Review.

The majority opinion below expressly recognized that controlling authority stated the nexus test in the disjunctive: "Specific jurisdiction exists when 'the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that **arise out of or relate to** those activities.'" App. 6a (emphasis added). Nevertheless, without explanation and in the face of a multi-page dissent that focused on the "related to" prong of the nexus test, *see* App. 11a-26a, the majority opinion consciously pruned "or related to" from the nexus test: "In this case, the relevant contacts from which Clemens's cause of action **arises** are the allegedly defamatory remarks about Clemens which McNamee made to the Mitchell Commission and John Heyman of SI.com."[1] App. 6a-7a (emphasis added).

The majority's refusal to expressly acknowledge that it was rejecting one-half of the nexus test imposed

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[1] Clemens repeatedly argued in the court of appeals that specific personal jurisdiction over McNamee in Texas was proper based on his Texas business contacts, his false statements to Pettitte while in Texas, and his false statements to SI.com and the Mitchell Commission. *See* Reply App. 4a-5a, 13a-14a, 20a-23a.

by controlling authority cannot insulate its decision from review as McNamee contends. *See* Opp. at 13-16. To the contrary, the majority's silent deviation from controlling authority is pernicious and highlights the need for review.

III. The Majority Opinion Addressed—Incorrectly—The Nexus Test.

McNamee's assertion that the majority opinion did not reach the issue of the connection required between a plaintiff's claims and a nonresident defendant's forum contacts is incorrect. *See* Opp. at 14-16. The majority found **only** that McNamee's defamatory statements to the Mitchell Commission and SI.com did not constitute purposeful availment:

> In this case, the relevant contacts from which Clemens' cause of action arises are the allegedly defamatory remarks about Clemens which McNamee made to the Mitchell Commission and John Heyman of SI.com. Therefore, the issue narrows to whether these defamatory remarks constituted purposeful availment such that McNamee could have reasonably anticipated being haled into a Texas court as a result of his statements.

App. 6a-7a. The majority never found that McNamee's Texas business contacts or his false statements to Pettitte in Texas did not constitute purposeful availment. The majority simply refused to engage the dissent on this issue. *See* App. 13a ("McNamee purposefully availed himself of conducting business in Texas.") (Haynes, J., dissenting).

The majority refused to consider McNamee's Texas business contacts and his false statements to Pettitte in Texas in its purposeful availment analysis because it implicitly found that those contacts were irrelevant. *See* App. 6a ("[T]he relevant contacts . . . are the allegedly defamatory remarks about Clemens which McNamee made to the Mitchell Commission and John Heyman of SI.com."). The majority found those contacts to be irrelevant because Clemens's claim did not "arise[]" from them. *See id.* ("[T]he relevant contacts from which Clemens' cause of action arises are the allegedly defamatory remarks about Clemens which McNamee made to the Mitchell Commission and John Heyman of SI.com."). Thus, the majority necessarily reached the issue of the connection required between a plaintiff's claims and a nonresident defendant's forum contacts. And when it reached the issue, the majority erred by applying only one-half of the nexus test.

IV. McNamee's Texas Contacts Satisfy A Majority Of The Nexus Tests Used By Courts Of Appeals.

Clemens identified at least five different nexus tests used by courts of appeals: (1) proximate cause or "arise out of;" (2) substantive relevance; (3) "meaningful link;" (4) but-for causation; and (5) substantial connection or "related to." Judge Catharina Haynes's dissent demonstrates that McNamee's Texas contacts satisfy the second, third, and fifth tests. *See* App. 12a-15a, 20a, 24a; Pet. at 21-23.

However, Judge Haynes's description of McNamee's Texas contacts omitted McNamee's previous false

statements to Pettitte in Texas that Clemens had used steroids and HGH. McNamee's prior false accusations in Texas are evidence of the actual malice element of Clemens's defamation claims, and also establish the substantive relevance and substantial connection/related to nexus tests.[2] *See O'Connor v. Sandy Lane Hotel Co. Ltd.*, 496 F.3d 312, 319 (3d Cir. 2007) ("Substantive relevance" "test examines whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim.");[3] *Freedom Newspapers v. Cantu*, 168 S.W.3d 847, 858 (Tex. 2005) ("[A] personal vendetta demonstrated by a history of false allegations may provide some evidence of malice . . . ."); *see also* David A. Elder, *Defamation: A Lawyer's Guide* § 7.3 (2010) ("[T]he decisions generally hold that almost any evidence of common law malice may be *relevant and admissible* evidence on the constitutional actual malice issue . . . .").

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[2] Although Clemens dismissed his defamation claims that were based on McNamee's false statements to Pettitte in Texas, the facts that formed the basis of those claims did not thereby disappear or become irrelevant. *See* App. 75a ¶ 6, 86a ¶ 36.

[3] The substantive relevance test determines relevance "from the point of view of some state law that would arguably govern the case. At this threshold point, one need not make a full-fledged choice of law determination: one need merely consider the laws reasonably vying for application." Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1456 (1988).

V. No Alternate Ground For Affirmance Exists Regarding The Defamatory Statement On Which Clemens Seeks Review.

McNamee's assertion that an "alternate ground for affirmance makes certiorari particularly inappropriate" is a red herring. *See* Opp. at 21-22. McNamee himself admits that the "alternate ground" applies only to McNamee's statements to the Mitchell Commission, and not to his statements to SI.com. *See id.* at 21 n.9. And Clemens's petition was clear that he was seeking review of personal jurisdiction over McNamee's statements to SI.com. *See* Pet. at 6. Thus, the "alternate ground" does not apply to the defamatory statement on which Clemens seeks review.

VI. A Due Process Analysis That Turns On The False Content Of A Defamatory Statement Is Indefensible.

With regard to Clemens's second issue, McNamee flees from the majority opinion's interpretation of the *Calder v. Jones*, 465 U.S. 783 (1984) "express aiming" requirement: "The court of appeals here did not say that Clemens could *only* satisfy *Calder* by" showing "a defamatory statement's reference to the plaintiff's forum activities or that the statement is drawn from forum sources." Opp. at 12. But that is exactly what the majority required:

> We read *Calder* as requiring the plaintiff seeking to assert specific personal jurisdiction over a defendant in a defamation case to show '(1) the subject matter of and (2) the sources

> relied upon for the article were in the forum state.'

App. 9a.

Recognizing the indefensibility of a due process analysis that turns on the false content of a defamatory statement, McNamee leaves it undefended. Instead, McNamee attacks a straw man—whether damage to Clemens in Texas by itself is sufficient to satisfy *Calder*. *See* Opp. at 8. But Clemens has never taken that position. Instead, Clemens has always contended that he satisfied *Calder*'s "express aiming" test because McNamee intentionally and tortiously published a defamatory statement about Clemens to SI.com, knowing that it would have a devastating impact on Clemens and that he would bear the brunt of that injury in Texas, where McNamee knew he lives, worked, and in which the statement would be widely circulated. This undisputed conduct is all that *Calder* itself requires to constitute "express aiming," even if some courts of appeals have tinkered with the test until it is unrecognizable. *See Calder*, 465 U.S. at 789-90; App. 22a ("[U]nder *Calder*, personal jurisdiction is appropriate over McNamee because McNamee knew that Clemens resided and worked in Texas and that Clemens would feel the brunt of the impact of the allegedly defamatory statements in Texas.") (Haynes, J., dissenting).

Although Clemens narrowly tailored the second issue in his petition to the conflict that exists among the circuit courts of appeals regarding the importance of the content of a defamatory statement to the specific personal jurisdiction analysis, this case also implicates a broader conflict identified in another case that is

pending before the Court. That case, *Roberts v. Kauffman Racing Equip., L.L.C.*, No. 10-167, presents the question whether *Calder*'s "express aiming" test is satisfied by a defendant's intentional tort involving the Internet while knowing the plaintiff's state of residence. The Court's resolution of *Roberts* will also likely impact the resolution of this case.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 09-20625

[Filed January 29, 2010]

WILLIAM ROGER CLEMENS Appellant	)
v.	)
BRIAN MCNAMEE Appellee	)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

BRIEF OF APPELLANT WILLIAM ROGER CLEMENS

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* * *

with prejudice the remainder of his claims that had not previously been dismissed. 6 ROA 1519; 9T ROA 1535-36.

STATEMENT OF FACTS

I. Clemens Has Substantial Ties To Texas.

Clemens has lived in Texas since 1977, when he moved here from Ohio with his mother and five siblings. RE 63 ¶ 11. He attended Spring Woods High School, San Jacinto Junior College, and the University of Texas, all in Texas. RE 64 ¶ 12. In 1983, Clemens led the Texas Longhorns to the national collegiate baseball championship. *Id.* Thereafter, the University of Texas honored Clemens by retiring his number. *See id.*

After completing his collegiate career, Clemens was drafted by the Boston Red Sox and made his major league debut in 1984. RE 64 ¶ 13. Clemens played for the Red Sox for thirteen years from 1984-1996. *See id.* Clemens then played with the Toronto Blue Jays from 1997-1998. RE 65 ¶ 15-16. In 1998 in Toronto, Clemens met McNamee, who was then an assistant trainer with the Blue Jays. *Id.* ¶ 16. Clemens was traded to the New York Yankees in 1999, and played

there from 1999-2003 and in 2007. RE 65 ¶ 18, 66 ¶ 20, 67-68 ¶ 23, 68-69 ¶ 27.

Although Clemens temporarily lived in Boston, Toronto, and New York during the baseball season while playing for the Red Sox, Blue Jays, and Yankees, respectively, he returned to his home in Houston, Texas at the end of each season where he permanently resides with his wife and four children. RE 68 ¶ 24. Texas is also home to Clemens's extended family. *Id.* Clemens's mother lived in Texas until her death, and his five siblings and seven of his nephews and nieces still reside in Texas. *Id.*

From 2004-2006, Clemens played for his home-town Houston Astros. RE 68-69 ¶¶ 25-27. During his first year with the Astros, Clemens won his seventh Cy Young award, climbed to second on the all-time strike-out list, and was named the starter on the National League All Star Team. RE 68 ¶ 25. Also during Clemens's first year with the Astros, their attendance climbed by more than 25% from the previous year. *See* 5 ROA 1020-23. During his second year with the Astros, Clemens led the major league in earned run average, and the Astros advanced to the World Series for the first time in history. RE 68 ¶ 26. During Clemens's third year with the Astros, their attendance again topped 3,000,000. *See* 5 ROA 1023.

Clemens is also engaged in business and charitable ventures in Texas. *See* RE 62-63 ¶ 9. Clemens is a trustee of the Roger Clemens Foundation, a Houston-based charity. *See id.* Clemens also has long-term personal services contracts with the Houston Astros and other Texas-based businesses. *See id.*

II. McNamee Has Conducted Significant Business In Texas.

According to McNamee, in 1999 he began traveling to Texas during baseball's off-season to train Clemens at his home in Houston. *See* RE 61 ¶ 5; 5 ROA 1035-36. McNamee would also train Pettitte, another Yankees pitcher, during his trips to Texas. RE 61 ¶ 5. From 1999-2007, McNamee traveled to Texas at least 30-38 times to train Clemens and/or Pettitte.[1] Each of McNamee's trips to Texas lasted approximately five days. RE 61 ¶ 5, 5 ROA 1029, 1034. Thus, McNamee spent approximately 150-190 days in Texas training Clemens and/or Pettitte.

McNamee also earned significant income as payment for training Clemens and Pettitte in Texas. RE 61 ¶ 5. For example, Pettitte has testified that he paid McNamee $62,000-$64,000 to serve as his full-time personal trainer in 2004. 5 ROA 1043; *see* RE 61 ¶ 5.

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[1] By his own admission, McNamee traveled to Texas 2-3 times each year in 2000, 2001, 2002, 2003, 2005, 2006, and 2007, and 10 times in 2004, to train Clemens and/or Pettitte. *See* 2 ROA 246 ¶ 12. Thus, these trips totaled 24-31. However, in the deposition he gave Congress, McNamee testified that his trips to Texas to train Clemens began in 1999. *See* 5 ROA 1035. Thus, 2-3 more trips to Texas must be added to McNamee's total. Also, Pettitte testified in his deposition that in 2004 McNamee would travel to Texas during each homestand to train him. *See* 5 ROA 1051. The Houston Astros had 14 homestands during 2004. *See* 5 ROA 1053-60. Thus, another 4 trips must be added to McNamee's total. With those additions, McNamee's trips to Texas to train Clemens and/or Pettitte total 30-38.

Separate and apart from the training services he provided to Clemens and Pettitte in Texas, McNamee has also traveled to Texas twice as a trainer for the Yankees, once in 2000 and another time in 2001. 2 ROA 246 ¶ 11. McNamee spent a total of six days in Texas during those trips. *Id.*

III. McNamee Repeatedly Defamed Clemens By Falsely Accusing Him Of Using Steroids And HGH.

In 1999 or 2000, while at Clemens's Texas home to train him, McNamee falsely told Pettitte, a Texas resident, that Clemens, a Texas resident, had used human growth hormone ("HGH"). RE 72 ¶ 36; 1 ROA 219. Thereafter, in 2003 or 2004, while at Pettitte's Texas home to train him, McNamee falsely told Pettitte that Clemens had used steroids. RE ¶ 36, 5 ROA 1047-48. McNamee later repeated these false accusations that Clemens had used steroids and HGH to former United States Senator George Mitchell who was conducting a private investigation into the use of performance enhancing substances in Major League Baseball. *See* RE 70-71 ¶ 33; 5 ROA 1061-81. And shortly thereafter, McNamee again repeated his false accusation that Clemens had used steroids to John Heyman, a reporter for SI.com. RE 71-72 ¶ 35; 5 ROA 1085.

When he intentionally made his false accusations, McNamee knew: (1) Clemens was a Texas resident because McNamee had repeatedly traveled to Texas and stayed at Clemens's home while training him, *see* 5 ROA 1030-34, 1037; (2) Clemens had worked in Texas as a Houston Astro from 2004-2006, *see* RE 61 ¶¶ 5-6, 62-63 ¶ 9, 68-69 ¶¶ 25-27; (3) Clemens had

significant baseball and non-baseball related business interests in Texas, *see* RE 62-63 ¶ 9; 5 ROA 1038-39; (4) Clemens runs a charitable foundation in Texas that bears his name, RE 61-62 ¶ 6, 62-63 ¶ 9, 70-71 ¶ 33, 71-72 ¶ 35; (5) his false accusations would have a devastating impact on Clemens's reputation, mental status, and business interests in Texas; *see id.*; (5) the Mitchell Commission and SI.com would republish and widely circulate his false accusations in Texas, *see id.*; and (6) millions of Texas residents would read his false accusations against Clemens. *See id.*

McNamee's false accusations have in fact been circulated to millions of Texans. Virtually every major Texas newspaper and many smaller ones republished the false accusations McNamee made to the Mitchell Commission regarding Clemens. *See* 5 ROA 1088-1117. And a link to the Mitchell Report was immediately placed on dozens of websites, including MLB.com, the official website for Major League Baseball. *See id.* at 1118-20. MLB.com received over 19,000,000 visitors during the month the Mitchell Report was released. *See id.* at 1121-24. Similarly, the SI.com article was circulated to the approximately 16,000,000 Texas residents with Internet access. *See id.* at 1125-29.

It goes without saying that McNamee's false accusations have accomplished their purpose of destroying Clemens's good reputation and making him the subject of scorn and ridicule throughout Texas.

SUMMARY OF THE ARGUMENT

The district court erred by dismissing Clemens's defamation claims against McNamee for two reasons.

* * *

underneath the traditional umbrella of whatever privilege he might have been entitled to assert. These statements to private third parties simply were not made in the due course of a judicial proceeding. The district court, however, was persuaded to grant absolute immunity to the statements because the federal government compelled McNamee to make the public disclosure. Again though, there is no law supporting this application, and in fact giving absolute privilege to such compelled statements is dangerous and counter to the principles of justice.

Even if McNamee's compelled statements to a third party during a criminal investigation were made in the due course of a judicial proceeding (which they were not), a party must also show that the government compelled the statements in furtherance of the investigation. The district court refused to require McNamee to meet this standard, and McNamee wholly failed to prove it. In fact, the undisputed evidence clearly establishes that the Mitchell Commission would not and need not assist the federal authorities. Thus, compelling McNamee to speak to the Mitchell Commission did not further the federal investigation and thus the statements were not related to the alleged judicial proceeding.

ARGUMENT

I. The District Court Erred By Holding That It Lacked Specific Personal Jurisdiction Over McNamee.

"When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident." *Stuart v. Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985). The plaintiff will meet his burden by presenting a *prima facie* case that personal jurisdiction is proper. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1165 (5th Cir. 1985).

In a diversity suit, a federal court has personal jurisdiction over a nonresident defendant to the same extent that a state court in that forum has jurisdiction. *See Bullion v. Gillespie*, 895 F.2d 213, 215 (5th Cir. 1990); FED. R. CIV. p. 4(e). The reach of this jurisdiction is limited by: (1) the state's long-arm statute; and (2) the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Bullion*, 895 F.2d at 215. Because the Texas long-arm statute extends to the limits of federal due process, this Court's two-step inquiry is reduced to an analysis of whether requiring McNamee to defend this lawsuit in Texas would violate due process.

The exercise of personal jurisdiction over a nonresident will not violate due process principles if two requirements are met. First, the nonresident defendant must have purposefully availed himself of the benefits and protections of the forum state by establishing "minimum contacts" with that forum

state. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Bullion*, 895 F.2d at 216. Here, only specific jurisdiction is at issue. Specific jurisdiction is appropriate when the nonresident defendant's contacts with the forum state arise from, or are directly related to, the cause of action. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8 (1984); *Bullion*, 895 F.2d at 216. Second, the exercise of jurisdiction over the nonresident defendant must not offend "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

Importantly, "on a motion to dismiss for lack of jurisdiction, uncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor for purposes of determining whether a *prima facie* case for personal jurisdiction exists." *Bullion*, 895 F.2d at 217. With few exceptions, McNamee did not controvert the jurisdictional facts alleged by Clemens in his Amended Complaint. In those rare instances when McNamee actually contradicted Clemens's jurisdictional allegations, Clemens submitted controverting evidence.[2] Consequently, Clemens's jurisdictional

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[2] For example, McNamee's affidavit states that his contacts with Texas began in 2000, but he testified to the Committee on Oversight and Government Reform that he first began training Clemens in Texas in December 1999. *See* 5 ROA 1035. And McNamee's affidavit states that he did not know whether Senator Mitchell would publish a report, whether it would state that Clemens had used performance enhancing substances, or if any report would be disseminated publicly. However, the Commissioner of Baseball made it clear from the outset that he

allegations must be taken as true for purposes of this Court's personal jurisdiction analysis. *See id.*

As detailed below, the Due Process Clause permitted the district court to exercise personal jurisdiction over McNamee because: (A) McNamee established "minimum contacts" with Texas, and Clemens's claims arise from, or are directly related to, those contacts; and (B) exercising personal jurisdiction over McNamee in Texas would not offend "traditional notions of fair play and substantial justice."

A. McNamee Has Sufficient Contacts With Texas Because McNamee's Intentional Conduct Was Calculated To And Did Seriously Harm Clemens In Texas.

1. Specific Personal Jurisdiction Over McNamee Exists In Texas Under *Calder v. Jones*'s "Effects" Tests.

Calder v. Jones, 465 U.S. 783 (1984), is the seminal United States Supreme Court case addressing a forum's specific personal jurisdiction over an individual, nonresident defendant accused of defamation. In *Calder*, a California resident sued a Florida reporter and a Florida editor for libel, intentional infliction of emotional distress, and invasion of privacy following the publication of an

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wanted the Mitchell Report made public, Senator Mitchell understood it was his responsibility to make public the information he learned, and McNamee knew that his false allegations against Clemens were included in the Mitchell Report before it was actually made public, giving him the chance to recant. *See* 5 ROA 1153, 1155.

article about her in a national publication, the *National Enquirer*, which was widely circulated in California and elsewhere. *See id.* at 784-85. A California superior court quashed the service of process on the reporter and editor for lack of personal jurisdiction. *See id.* at 785. A California court of appeals reversed the trial court's decision and announced the following "effects" test for personal jurisdiction:

> As the trial court observed, [the editor] did not enter California or even make telephone calls into the state in connection with his role in the preparation of the subject article; all of his acts with reference to that article apparently were performed in Florida. However, the requisite minimum contacts of a defendant with the forum state need not arise from his physical activity in that state. Every state has a natural interest in effects occurring within its territory, even if the act causing those effects was committed elsewhere. If a defendant commits an act or omission outside the forum state *with the intent* to cause a tortious effect within the state, the state may exercise jurisdiction over the defendant as to any cause of action arising from the effects. *The intent to cause tortious injury within the state when the tort actually occurs is generally a sufficient basis, without more, for the exercise of in personam jurisdiction*. The act may have been done with the intention of causing effects in the state. If so, the state may exercise the same judicial jurisdiction over the actor, or over the one who caused the act to be done, as to causes of action arising from these effects as it could have

> exercised if these effects had resulted from an act done within its territory. The complaint herein alleges that defendants, in publishing the defamatory article, acted maliciously and with the intent to injure plaintiffs. The general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation. For the purpose of the determining whether a California court may assume jurisdiction over [the editor] in this lawsuit, it must be presumed that [the editor], in participating in the publication of the article as its editor, intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred. Accordingly, a valid basis exists for California's exercise of personal jurisdiction over [the editor] with respect to the causes of action alleged herein.

Jones v. Calder, 187 Cal. Rptr. 825, 829 (Cal. Ct. App. 1982), *aff'd*, *Calder v. Jones*, 465 U.S. 783 (1984) (citations and quotations omitted) (emphasis in original).

In *Calder*, the United States Supreme Court expressly approved this "effects" test employed by the California court of appeals. *Calder*, 465 U.S. at 787 n.6. The court explained that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly caused the injury in California." *Id.* at 790. Moreover, the Supreme Court stated that the author and editor were "primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction is proper on that basis." *Id.* at 790. The Supreme Court affirmed the judgment of

the California Court of Appeals, "hold[ing] that jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California." *Id.* at 791 (emphasis added); *accord Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 400 (5th Cir. 2009) ("Under *Calder*, 'an act done outside the state that has consequences or effects within the state will suffice as a basis for jurisdiction in a suit arising from those consequences if the effects are seriously harmful and were intended or highly likely to follow from the nonresident defendant's conduct.'") (quoting *Guidry v. United States Tobacco Co.*, 188 F.3d 619, 628 (5th Cir. 1999)); *Kwik-Kopy Corp. v. Byers*, No. 01-20748, 37 Fed. Appx. 90, slip op. at 5 (5th Cir. May 9, 2002) ("[T]he Supreme Court in *Calder* clearly held that if intentional conduct is intended to cause injury in a specific state, that is sufficient to give specific jurisdiction to the courts of that state.").

McNamee's contacts with Texas present a much more compelling case for personal jurisdiction than did the editor's contacts with California in *Calder*. In *Calder*, the editor's only relevant contacts with California were visiting California twice (with neither trip related to the defamatory article), approving the initial evaluation of the subject of the article, editing the article in its final form, and refusing to print a retraction of the article. *See Calder*, 465 U.S. at 786.

Here, McNamee's contacts with Texas are much more extensive. McNamee: (1) contracted with two Texas residents, Clemens and Pettitte, to perform strength and conditioning trainer services in Texas; (2) traveled to Texas at least 30-38 times between 1999-2007 for 5 days at a time (totaling 150-190 days)

to train Clemens and Pettitte; (3) earned a substantial portion of his income from training Clemens and Pettitte in Texas; (4) falsely accused Clemens, a Texas resident, of using steroids and HGH while present in Texas to train Clemens and Pettitte; and (5) repeated his false accusations that Clemens had used steroids and HGH to the Mitchell Commission and SI.com, knowing that the accusations would be widely-circulated and cause serious injury to Clemens in Texas where McNamee knew Clemens lives, worked, and has significant business and charitable interests. Consequently, as in *Calder*, the exercise of personal jurisdiction over McNamee in Texas comports with due process.

* * *

APPENDIX 2

United States Court of Appeals
for the
Fifth Circuit

No. 09-20625

[Filed March 12, 2010]

WILLIAM ROGER CLEMENS,	)
	)
Appellant,	)
	)
– v. –	)
	)
BRIAN MCNAMEE,	)
	)
Appellee.	)
	)

APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION
CIVIL ACTION NO. 4:08-CV-00471
HONORABLE KEITH P. ELLISON

BRIEF OF APPELLEE BRIAN MCNAMEE

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March 12, 2010

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residence. *Revell*, 317 F.3d at 473-75 (emphasis added; looking to and approving of *Reynolds*, 23 F.3d 1110, *Young*, 315 F.3d 256, and *Remick*, 238 F.3d 248).

These holdings are wholly in line with Supreme Court precedent which requires that the due process jurisdictional inquiry focus on the defendant and his purposeful availment of the forum —what did the defendant do that opened him up to suit in the forum state—instead of merely the "fortuity" of where plaintiff lived or the defendant's knowledge of that fact. *Burger King*, 471 U.S. at 478 (mere foreseeability of causing injury in another state is not a "sufficient benchmark" for exercising personal jurisdiction). Where, as here, McNamee's statements did not involve the forum state and did not rely on Texas sources, he could not have expected to be haled into court here.

c) McNamee's Alleged Contacts with Texas Are Unrelated to Plaintiff's Claims and Thus Irrelevant

Irrelevant to this analysis are McNamee's business contacts with Texas; such contacts are only relevant to an assertion of general jurisdiction. But here Plaintiff has specifically waived any claim of general jurisdiction. *See* App. Br. 12. Clemens's repeated and extensive recitations describing McNamee's purported business contacts with Texas, *see* App. Br. 5-6, 17, 22, 25, are collateral and seem calculated to distract from the question at hand: Specific jurisdiction arises only when the defendant's contacts with the forum "arise from, or are directly related to, the cause of action." *Revell*, 317 F.3d at 470. As the Fifth Circuit has made

clear, for "specific jurisdiction we look *only* to the contact out of which the cause of action arises." *Id.* at 472 (emphasis added).

In *Revell* the defamation claim arose from "the maintenance of the [Columbia University] internet bulletin board." *Id.* In analyzing defendant's minimum contacts, this Court therefore only looked to the "bulletin board" component of Columbia's website and not other portions of Columbia's website that could constitute contacts with Texas: "[s]ince the defamation action does not arise out of the solicitation of subscriptions or applications by Columbia, those portions of the website *need not be considered*." *Id.* (emphasis added). Accordingly, Clemens's attempt to distinguish *Revell* on that ground, claiming that "unlike the defendant in *Revell* who had never visited or conducted business in Texas, McNamee has been to Texas many times," must fail, as this distinction is immaterial. App. Br. 22. Clemens's repeated references to McNamee's occasional visits to Texas is legally irrelevant.

d) Clemens's Authority is not to the Contrary

Clemens cites not a single case from this Circuit in which a court has asserted jurisdiction over a defamation defendant where the alleged defamatory statements involved out-of-state activities. This is no oversight; the case law supports Defendant. Clemens decries this binding case law as unfair, claiming that it "would perversely twist due process to permit McNamee to defeat jurisdiction"

* * *

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 09-20625

[Filed April 5, 2010]

WILLIAM ROGER CLEMENS Appellant	)
v.	)
BRIAN McNAMEE Appellee	)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

REPLY BRIEF OF
APPELLANT WILLIAM ROGER CLEMENS

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* * *

B. Clemens Does Not Rely Exclusively On The Harm He Suffered In Texas To Establish Personal Jurisdiction Over McNamee In Texas.

McNamee repeatedly asserts that Clemens relies exclusively on the harm he suffered in Texas to establish personal jurisdiction over McNamee in Texas. *See* McNamee Br. at 12, 13. McNamee mischaracterizes Clemens's position.

Clemens relies on numerous McNamee contacts with Texas to establish personal jurisdiction over him in Texas, including the fact that McNamee: (1) contracted with two Texas residents, Clemens and Andy Pettitte, to perform strength and conditioning trainer services in Texas; (2) traveled to Texas at least 30-38 times between 1999-2007 for 5 days at a time (totaling 150-190 days) to train Clemens and Pettitte; (3) earned a substantial portion of his income from training Clemens and Pettitte in Texas; (4) falsely accused Clemens, a Texas resident, of using steroids and HGH while present in Texas to train Clemens and Pettitte; (5) intentionally and maliciously repeated those false accusations to the Mitchell Commission and SI.com, knowing that the accusations would be widely-circulated and cause serious injury to Clemens in Texas where McNamee knew Clemens lives,

worked, and has significant business and charitable interests; and (6) caused devastating injury to Clemens in Texas. In light of these extensive contacts, McNamee should have reasonably anticipated being haled into a Texas court to answer for his conduct.

C. McNamee's Business Contacts With Texas Are Relevant To The Specific Personal Jurisdiction Inquiry.

McNamee argues that his business contacts are irrelevant to the specific personal jurisdiction inquiry. *See* McNamee Br. at 15 n.6, 31-32. McNamee's invitation to ignore his extensive business contacts with Texas should be declined. Clemens's defamation claims all arise from or are related to McNamee's business contacts with Texas. But even if Clemens's defamation claims did not arise from or were not related to McNamee's business contacts with Texas, those contacts would still be relevant under *Calder*'s "effects test":

> Whether a state has judicial jurisdiction over one who by an act done outside the state causes an effect within the state may depend upon a variety of factors. Of significance are the extent of the relationship of the state to the defendant . . . . **The closer the defendant's relationship to the state, the greater is the likelihood that the state may exercise judicial jurisdiction over him as to claims arising from the effects of the act in the state. . . . So if the defendant does business in the state, . . . there is a greater likelihood that the state may exercise judicial jurisdiction over him as to claims**

> **arising from the effects in the state of an act done by him outside the state than if the defendant did not have this relationship to the state. This is so even though the defendant's relationship to the state is not related in any way to the act or to such of its effects in the state as are involved in the suit.**

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt c (1988) (emphasis added);[1] *see Calder*, 465 U.S. at 786 (describing two trips editor made to the forum as "relevant contacts" even though they were not related to the plaintiff's defamation claim).

D. McNamee's False Accusations Against Clemens In Texas Are Relevant To The Personal Jurisdiction Inquiry.

While present in Texas to train Clemens and Pettitte, McNamee falsely told Pettitte that Clemens used steroids and HGH. RE 72 ¶ 36; 1 ROA 219; RE ¶ 36; 5 ROA 1047-48. McNamee asserts that these contacts with Texas are irrelevant to the personal jurisdiction inquiry because Clemens dismissed his

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[1] The United States Supreme Court in *Calder* relied on the Restatement (Second) of Conflict of Laws § 37 in applying the "effects test" for personal jurisdiction. *See Calder*, 465 U.S. at 789. In addition, the Restatement (Second) of Conflict of Laws § 37 was also the primary authority relied on by the California court of appeals below. *See Jones v. Calder*, 187 Cal. Rptr. 825, 829 (Cal. Ct. App. 198), *aff'd*, *Calder v. Jones*, 465 U.S. 783 (1984). Finally, this Court has also extensively relied on Restatement (Second) Conflict of Laws § 37 in applying the "effects test." *See Guidry v. United States Tobacco Co.*, 188 F.3d 619, 629-30 (5th Cir. 1999).

defamation claims that were based on those false statements. *See* McNamee Br. at 34-35. McNamee is wrong because Clemens's existing defamation claims based on McNamee's statements to the Mitchell Commission and SI.com arise from or are related to McNamee's false statements to Pettitte—the false statements to the Mitchell Commission and SI.com are identical to and merely repeat the same false statements that McNamee previously made to Pettitte while in Texas. Clemens's voluntary dismissal of his defamation claims that were based on McNamee's false statements to Pettitte in Texas does not cause the facts that formed the basis of those claims to disappear or become irrelevant.[2]

E. McNamee "Expressly Aimed" His Tortious Conduct At Texas.

McNamee asserts that he did not "expressly aim" his tortious conduct at Texas. *See* McNamee Br. at 22-24. To the contrary, as in *Calder*, McNamee "expressly aimed" his tortious conduct at Texas because he (1) intentionally and maliciously made false statements to the Mitchell Commission and SI.com, knowing that the false accusations would be widely-circulated in Texas, and (2) caused devastating injury to Clemens in Texas, where McNamee knew Clemens would feel the brunt of the harm because he knew that Clemens lives, worked, and has significant business and charitable interests in Texas. *See* RE 21 (district

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[2] McNamee mistakenly asserts that the district court dismissed as insufficiently pleaded Clemens's defamation claims that were based on McNamee's false statements to Pettitte. *See* RE 36; 6 ROA 1519; 9T ROA 1535-36.

court found that "McNamee knew Clemens would feel the brunt of the harm from his statements in Texas"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 cmt. e (recognizing that a plaintiff suffers his greatest injury from a multistate defamatory communication in the state of his domicile).

The Court in *Calder* noted that such conduct is precisely the type that is "expressly aimed" at the forum state:

> [The defendants] intentional, and allegedly tortious, actions were **expressly aimed** at California. **[The author] wrote and [the editor] edited an article that they knew would have a potentially devastating impact upon [the plaintiff]. And they knew that the brunt of that injury would be felt by [the plaintiff] in the State in which she lives and works and in which the *National Enquirer* has its largest circulation.** Under the circumstances, [the defendants] must 'reasonably anticipate being haled into court there' to answer for the truth of the statements made in their article.

Calder, 465 U.S. at 789-90 (emphasis added).

The fact that, in addition to their wide circulation in Texas, McNamee's statements were also circulated nationally does not diminish the fact that the statements about Clemens were directed at Texas. *See Arthur v. Stern*, No. H-07-3742, 2008 WL 2620116, at *13 (S.D. Tex. June 26, 2008) (Rosenthal, J.) ("The fact that the interview was broadcast in other states does not diminish the fact that the statements about [the

plaintiff] were directed at Texas and had foreseeable effects there."); *Gordy v. Daily News, L.P.*, 95 F.3d 829, 833-34 (9111 Cir. 1996) ("Surely if some New York entity had written only 13 defamatory letters and sent them all to California, we would permit a defamed California resident to sue the entity in California. It is not clear why the distribution of 13 to 18 defamatory copies of a column loses magnitude as a contact simply because the Daily News does a lot of other things elsewhere."); *see also Guidry*, 188 F.3d at 626, 628-30 (stating that communications made in national publications circulated in Louisiana and on national television broadcast into Louisiana were "knowingly initiated and aimed" at consumers in Louisiana).

* * *